

IMPLEMENTING CURRENT THEORIES OF JURISDICTION, VENUE AND SERVICE OF PROCESS — PROPOSALS FOR REVISION OF THE OHIO STATUTES†

RICHARD S. MILLER*

Professor Miller examines the policies which should underlie jurisdictional, venue, and service requirements, and makes specific statutory recommendations to better effectuate these policies in Ohio, in particular to avoid the defeat of meritorious claims on procedural grounds and to provide most equitably for the convenience of both plaintiffs and defendants.

As the substantive law governing the relations among members of society grows in quantity and complexity, the urgency of simplifying the means of invoking and applying that law becomes more apparent. For, to the extent that substantive laws are designed to implement important societal objectives and policies, obstacles in the way of simple and even-handed application impede the attainment of these goals. Furthermore, such obstacles are likely to give rise to popular dissatisfaction with the judicial system.

Such truisms—which were forcefully brought home to the bench and bar of the United States as early as 1904 by Roscoe Pound¹—have resulted in major reforms which have brought about, and are still bringing about, modernization, liberalization and even simplification of practice and procedure in the federal courts² and in many state courts.³ Ohio, however, has seemed to lag behind

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* Professor of Law, The Ohio State University College of Law. I wish to thank Raymond J. Posgay and Charles J. Kegler for their assistance in gathering the materials for this paper and for their useful suggestions. My thanks also go to my colleague, Professor Robert L. Wills, for reading the manuscript and providing helpful comments.

¹ See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, A GOLDEN ANNIVERSARY REPRINT TO PROMOTE THE EFFICIENT ADMINISTRATION OF JUSTICE, (Am. Judic. Soc. 1956).

² See FED. R. CIV. P. in J. MOORE & H. FINK, *MOORE'S FEDERAL PRACTICE—RULES AND OFFICIAL FORMS AS AMENDED* (1966).

³ See, e.g., N. Y. CIVIL PRACTICE LAW & RULES (1962); ILLINOIS CIV. PRAC. ACT, SMITH-HURD ILLINOIS ANNOTATED STATUTES, ch. 110 (1964); MICH. GEN. C. R. of 1963 and MICH. REV. JUDIC. ACT of 1961. See generally Elliot, *Improvements in Judicial Administration, 1906-1956*, THE ADMINISTRATION OF JUSTICE IN RETROSPECT 42 (Harding ed. 1957), and Scott, *Pound's Influence on Civil Procedure*, 78 HARV. L. REV. 1568 (1965).

other States in this area, particularly in regard to the application of rules of jurisdiction over the person, venue and service of process, the subjects of this paper.⁴ Application is emphasized, since by and large the rules themselves are not particularly illiberal. More often than not it seems to be the wooden and excessively technical or restrictive application of the rules to concrete cases which tends to cut off the colorable substantive rights of a litigant. Whether such applications are occasioned by the requirements of statutory interpretation,⁵ by insistence upon the strict logic of *stare decisis*,⁶ by the "sporting theory" of litigation, or by other considerations,⁷ the fact remains that some recent decisions of the Ohio courts in this area seem to be terribly harsh and inconsiderate of substantive rights. Perhaps Ohio is seriously handicapped in reforming its rules of procedure by the absence of a central judicial rule-making

⁴ See generally OHIO REV. CODE ANN. chs. 2305, 2307, 2311 and 2703 (Page 1953) which contain most of the statutes relating to these subjects.

⁵ *Center v. St. Peter's Episcopal Church*, 11 Ohio St.2d 64, 227 N.E.2d 599 (1967) (Plaintiff failed to comply with technical requirements of service. The supreme court affirmed a judgment quashing service and refusing to allow process to be amended to conform to statute, although defendants must have received actual notice. The court said: "The statutory method of service of process upon a corporation is mandatory and must be followed strictly," 11 Ohio St.2d at 68, 227 N.E.2d at 601 (1967)); *Mason v. Waters*, 6 Ohio St.2d 212, 217 N.E.2d 213 (1966) (failure of plaintiff to have defendant served by sheriff of county in which defendant resided required dismissal, even though defendant received residence service; savings statute held inapplicable where defendant was not properly served); *Krabill v. Gibbs*, 9 Ohio App.2d 310, 224 N.E.2d 365 (1967) (mail notice to defendant held defective and service quashed even though defendant apparently received summons through the mails); *Hayslip v. Conrad Produce, Inc.*, 10 Ohio Misc. 155, 226 N.E.2d 839 (C.P. 1967) (demurrer to plaintiff's petition in motor vehicle accident case sustained where plaintiff brought suit against non-resident defendant in venue permitted under general long-arm statute but not included as a proper county in earlier statute dealing only with actions for injuries caused by motor vehicle); *Farley v. Head*, 11 Ohio Misc. 255, N.E.2d 849 C.P. 1966) (action dismissed where plaintiff mistakenly brought suit in county of improper venue); *Baldine V. Klee*, 10 Ohio Misc. 203, 224 N.E.2d 544 (C.P. 1965) (service of summons quashed where summons failed to state the nature of the relief sought, even though a copy of the petition was served with the summons); *Baldine v. Klee*, 10 Ohio Misc. 203, 224 N.E.2d 550 (C.P. 1966) (savings statute held inapplicable to extend statute of limitations where, by virtue of defective summons in the original suit, plaintiffs failed to get jurisdiction over defendants within the limitations period). See also cases cited *id.* at 216-17, 224 N.E.2d at 555.

⁶ *Id.*

⁷ *Res judicata*, for example. *LaBarbera v. Batsch*, 10 Ohio St. 2d 106, 227 N.E.2d 55 (1967).

authority for all state courts.⁸ But even before such authority is created,⁹ the legislature has power to make changes which clearly and unequivocally favor the rights of litigants over the "rules of the game." Indeed, the purpose of this article is to propose some statutory changes in the areas of jurisdiction, venue and process designed to make the loss of substantive rights in these areas less likely by taking advantage of enlightened current theory of the purposes these procedural instruments are supposed to serve. Part I contains a discussion of these topics more or less theoretically and suggests some approaches in general terms. In Part II concrete recommendations are set forth for statutory amendments and additions. Commencement of suit by attachment and garnishment, quasi-in-rem and in rem, will not be covered in this article.¹⁰

I. THEORIES OF JURISDICTION, VENUE AND SERVICE OF PROCESS

A. *In General*

Issues of jurisdiction of the person, venue and service of process arise in the context of claims relating either to the authority of a court to hear and decide a case or to the enforceability of a judicial judgment. The English and early American development of the conditions to the exercise of judicial authority provide an interesting chapter in the annals of the common law. The rules of venue, relating to the geographical situs of the suit, required initially that a law suit be tried in the county where the wrongful act was alleged to have occurred, so that jury members could decide the case

⁸ Each common pleas court may promulgate its own rules of practice, *Cassidy v. Glossip*, 12 Ohio St.2d 17, 22, 231 N.E.2d 64, 69 (1967), but, aside from the Ohio legislature, there is no central agency which has the authority to impose uniform rules of practice on all trial courts in the state. *See* 40 OHIO BAR 328 (1967).

Recent uniform rules of procedure for traffic courts in Ohio were adopted by the Ohio Supreme Court pursuant to legislative authority. OHIO REV. CODE ANN. §§ 2935.17, 2937.46 (Page 1953). *See* 40 OHIO BAR 1434-51 (1967).

⁹ A "Modern Courts Resolution" encompassing reform of the judicial system including provision for central rule-making authority has passed the Ohio House of Representatives, SUB. HOUSE J. R. 42 (1967), and a similar resolution will come before the Senate in the January, 1968 session. 40 OHIO BAR 327 (1967). If it passes the Senate the resolution will appear as a constitutional amendment on the May or November ballot.

¹⁰ As a result of the passage of expansive long-arm statutes, a good argument can be made for abolishing or limiting the use of attachment and garnishment as a basis for acquiring jurisdiction quasi-in-rem. *See* Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962); Note, 50 CALIF. L. REV. 735 (1962).

upon their own personal knowledge of the facts.¹¹ Service of process often involved the presentation of a writ—an order from higher authority—to the sheriff directing him to arrest the defendant and bring his body into court so that he might answer the charges against him¹²—this, of course, being consistent with the view that the court's jurisdictional authority rested upon physical power over the defendant.¹³ Jurisdictional power was further limited by the territorial theory; with few exceptions, a court could only exercise its authority by judgment with respect to persons or property physically located within the territory served by the court.¹⁴ Of course, these relatively primitive concepts have undergone substantial change; juries no longer decide cases upon their own knowledge of the facts nor are they permitted to do so;¹⁵ jurisdiction can attach without bringing defendant physically into court;¹⁶ and judgments against persons or entities outside the territory of the State in which the court is sitting are valid and may be enforced in any State if due process of law has been served.¹⁷ As a result of these changes both the objectives of and the restraints upon service, personal jurisdiction and venue have undergone a corresponding change and modernization. The major purpose of venue is to provide a fair and convenient geographical location for trial within the borders of a jurisdiction, usually a State, in which jurisdiction over the defendant or his property has been acquired.¹⁸ While convenience to defendant rather than plaintiff is usually emphasized, and while the location of witnesses—the place where the cause of action arose—may also be an important factor, there are few limitations on the locations which the legislature may estab-

¹¹ See I. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 127-9 (5th ed. 1956); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 *YALE L.J.* 289, 300-303 (1956) [hereinafter cited as Ehrenzweig]; cf. *Livingston v. Jefferson*, 15 F. Cas. 660 (No. 8411) (C.C. D. Va. 1811).

¹² W. BLUME, *AMERICAN CIVIL PROCEDURE* 274 (1955).

¹³ See *McDonald v. Mabey*, 243 U.S. 90, 91 (1917), where Mr. Justice Holmes said that "the foundation of jurisdiction is physical power"

¹⁴ See *Pennoyer v. Neff*, 95 U.S. 714 (1877); F. JAMES, *CIVIL PROCEDURE* 621 (1965) [hereinafter cited as JAMES].

¹⁵ See JAMES at 238-9.

¹⁶ See JAMES at 622.

¹⁷ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Milliken v. Meyer*, 311 U.S. 457 (1940); JAMES at 621-44.

¹⁸ See Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 *MICH. L. REV.* 307, 331 (1951) [hereinafter cited as Stevens] and see generally Ehrenzweig *passim*.

lish as proper venues.¹⁹ The major purpose of service is to give defendant notice of the action and a reasonable opportunity to defend.²⁰ Except possibly in cases of jurisdiction based upon transient presence of defendant or his property,²¹ service is not really a device to bring defendant within the jurisdiction, nor is it a separate basis of jurisdiction. Rather, it is merely a condition to the exercise of jurisdiction based on other grounds—minimum contacts, domicile—and the specific method used is irrelevant so long as it is “reasonably calculated” to fulfill its major purpose.²² Lastly, the rules of personal jurisdiction need only insure that there exists sufficient relationship between the defendant and the State so that entry of judgment affecting the rights of the defendant will not offends notions of “fair play and substantial justice”—due process of law.²³ Due process, in turn, is essentially a question of fairness and convenience to the parties—especially the defendant—and only secondarily, if at all, a matter of inherent limitations on a State’s territorial authority.²⁴ Thus, personal jurisdiction bears some resemblance to venue, although the former mainly governs the allocation of judicial business among States and is governed by the due process clause of the federal constitution, while the latter treats of intra-state allocations and has so far been a matter governed mainly by State statute.

The rehearsal of these developments—which are too well reported elsewhere to require elaboration here²⁵—suggests the possi-

¹⁹ See Stevens.

²⁰ See JAMES at 649-53. Cf. *Shilling v. Octavio*, 176 Ohio St. 123, 198 N.E.2d 52 (1964).

²¹ Compare *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950) with *Pennoy v. Neff*, 95 U. S. 714 (1877).

²² See JAMES at 649-53.

²³ *International Shoe Co. v. Washington*, 326 U. S. 310 (1945) is, of course, the leading case; cf. Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241.

²⁴ *Id.* Cf. RESTATEMENT (SECOND) of CONFLICT OF LAWS § 24, comment b at 133-35 (Proposed Official Draft, Part I, 1967); Ehrenzweig at 312-14; Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of the State Courts*, 25 U. CHI. L. REV. 569 (1958); Note, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

While the decision in *Hanson v. Denckla*, 357 U. S. 235 (1958), seemed to reestablish territorial limits on the judicial power of states *a la* *Pennoy v. Neff*, it is not at all clear that this retreat will be more than a temporary set-back for a theory of jurisdiction based mainly on convenience and fairness. See Hazard, *supra* note 23, at 243-44, 274; cf. Briggs, *Jurisdiction by Statute*, 24 OHIO ST. L. J. 223 (1963).

²⁵ See sources cited notes 10-24 *supra*. See also Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

bility of developing a relatively simple scheme along the following lines:

(1) Jurisdictional reach over defendants would be broadened to the maximum permitted by the due process clause of the United States Constitution;

(2) Within a State, suits might be brought in any location which, under the facts of the particular case, would prove to be a fair and convenient place for trial;

(3) Any method of service designed to fulfill the constitutional requirements of adequate notice would be permitted, the specific method used being left to the option of the plaintiff. No summons would ever be quashed or suit dismissed if plaintiff could prove that the method used—however unusual—was reasonably calculated to give defendant notice of the suit and an opportunity to defend or that defendant actually received credible notice of the action in time to prepare an answer and to defend. The technical details of service, limitations upon the power of a sheriff or other officer to serve, and the technical requirements of the return of service would become unimportant; failure to comply with them would rarely prove fatal, although certain presumptions of validity or correctness would attach if prescribed procedures were followed.

(4) Either party could file a "motion to the geography," asking for a dismissal or transfer of the case to a more convenient location within or outside the State. Such motion would encompass constitutional objections to the place of suit—jurisdiction—matters going to convenience or fair trial but not raising constitutional questions—venue and forum non conveniens—, or both. The judge would not be permitted to dismiss the suit unless jurisdiction was clearly improper or unless it was brought in an improper or inconvenient place primarily to harass the opposite party. Rather, he would either retain the suit for trial or transfer to a more convenient forum. Actual costs, including attorney's fees, might be assessed against either party to compensate for hardship to the other, in such amount as the court deemed fair in the circumstances.

Obviously, there are in Ohio some problems attendant upon the adoption of such a program. Foremost are the political problems of extending jurisdiction beyond the fairly expansive range which has recently been adopted,²⁶ and of wrenching some entrenched concepts²⁷ from their all too secure foundations of tradi-

²⁶ OHIO REV. CODE ANN. § 2307.382 (Page 1953), the "long-arm" statute. See *Seilon, Inc. v. Brema S. p. A.* 271 Supp. 516 (N.D. Ohio 1967); Note, *Jurisdiction Under New Ohio "Long-Arm" Statute—Problems of Interpretation and Application*, 35 U. CIN. L. REV. 157 (1966); Note, *Ohio's Long-Arm Statute*, 15 CLEVELAND MAR. L. REV. 363 (1966).

²⁷ See cases cited note 5 *supra*.

tion. There is also the problem that in the absence of inter-state compacts, one State has not the power to transfer a case to the courts of another State—the kind of power possessed by federal judges in inter-district transfers.²⁸ Nonetheless, it may still be possible, by revising the existing statutory framework, and without expanding too far the legislative policies already present in that framework, to accomplish some of the objectives encompassed in the suggested scheme. The following general recommendations are so directed.

First, rules of service, venue and jurisdiction ought *always* to be construed liberally to effectuate their major contemporary purposes.²⁹ While an argument can be made that statutes creating or changing substantive rights in conflict with traditional common law rules ought to be narrowly construed in order to protect well-entrenched popular expectations, there is little to be said for applying the same rule of construction to procedural rules. Few people base their conduct upon beliefs as to where and in what manner they will be sued; those who do often have recourse to legal advice well before they act. Furthermore, statutes providing expanded methods of achieving jurisdiction and establishing venue are not necessarily in derogation of the common law, but on the contrary are more in consonance with what recent important scholarship expresses as the pre-*Pennoyer v. Neff* common law view that convenience was a more important consideration than mere physical power.³⁰ In addition, the doctrinal pedant should find no difficulty in labeling rules of service, jurisdiction and venue as remedial, and thus entitled to be liberally construed.³¹

²⁸ 28 U.S.C. 1404(a) (1965).

²⁹ Under current Ohio law remedial laws are to be "liberally construed in order to promote their object and assist the parties in obtaining justice." OHIO REV. CODE ANN. § 1.11 (Page 1953). However, by holding that strict compliance with a particular procedural statute is a matter of jurisdiction, or that the technical requirements of a procedural statute are mandatory, the courts have managed to side-step the requirements of a liberal construction. *See* cases cited note 5 *supra*, particularly *Baldino v. Klee*, 10 Ohio Misc. 203, 207-08, 224 N.E.2d 544, 548 (C.P. 1965). *But see* *Shilling v. Octavio*, 176 Ohio St. 123, 190 N.E.2d 52 (1964).

³⁰ *See* Ehrenzweig, *supra* note 11.

³¹ *Cf.* *State ex rel. Holdridge v. Industrial Comm'n*, 11 Ohio St.2d 175, 228 N.E.2d 621 (1967), *O'Mara v. Alberto-Culver Co.*, 215 N.E.2d 735 (Ohio C. P. 1966) (holding the long-arm statute remedial and therefore entitled to be applied in cases which arose before the statute was passed). *But cf.* *Bruney v. Little*, 8 Ohio Misc. 393, 222 N.E.2d 446 (1966) (holding the long-arm statute part remedial and part substantive and not entitled to retroactive application).

Second, when general rules of service, jurisdiction or venue applicable to all actions co-exist with special rules applicable to particular actions, both the general rule and the special rule should be available to establish service, jurisdiction or venue unless the special rule by its own terms is expressly made exclusive. Venue provisions for specific actions are spread throughout the Ohio Code, while general venue provisions are gathered together in a single chapter. Because the Code itself is silent as to which provision should govern in the event that both a specific and general provision seem to apply, a contrary rule creates a trap for the unwary. This problem is illustrated by the recent case of *Hayslip v. Conrad Produce, Inc.*³² There the plaintiff brought a property damage action arising out of a collision between a tractor-trailer owned by plaintiff and a truck owned by a non-resident defendant corporation, in the county of plaintiff's residence pursuant to the venue provision of the Ohio "long-arm" statute. The court sustained defendant's demurrer for lack of jurisdiction on the ground that venue should have been laid in the county where the accident occurred, pursuant to section 4515.01 of the OHIO REVISED CODE, which specifically deals with "venue in actions for injury caused by motor vehicles." The court reasoned that the legislature, in passing the "long-arm" statute, did not intend "to repeal or modify the specific provision contained in section 4515.01, Revised Code, with respect to venue in automobile accident cases." Be that as it may, however, there was likewise no indication from the legislature that it intended the newer venue provision to be inapplicable to such cases, or that it intended section 4515.01 to remain the exclusive criterion for venue. Certainly, the Commissioners on Uniform State Laws who drafted the long-arm statute (but not the venue provision) did not contemplate that it would be inapplicable to in-state auto accidents involving non-resident defendants.³³ The result of the decision, however, is that plaintiff's cause is thrown out of court by reason of an honest misinterpretation which any attorney might make. While the plaintiff in *Hayslip* may be able to recommence suit in the proper county, the statute of limitations might

³² 10 Ohio Misc. 155, 226 N.E.2d 839 (1967).

³³ See NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS, PROCEEDINGS 220-25 (1962) [hereinafter cited as PROCEEDINGS].

act as a bar to recommencement in other similar cases.³⁴ It may be conceded, as the court reasoned, that the county of plaintiff's residence may be a "strange forum" for defendant to be sued in, although it is difficult to understand why it is any stranger than the county through which he happened to be driving when the accident occurred. Also, the county of plaintiff's residence may be inconvenient from the point of view of the location of the witnesses or the premises, even though this may not ordinarily be determined until the parties present the facts. But the more appropriate approach would be to uphold venue under either provision and permit transfer to a more convenient forum "for the convenience of parties and witnesses" and "in the interest of justice" if serious inconvenience or unfairness to defendant could be shown.³⁵

Third, technical defects in serving process, acquiring jurisdiction of persons or property or selecting venue ought not to result in the dismissal of a lawsuit or the invalidation of a judgment once rendered unless the defect is of sufficient magnitude to violate an important constitutional or statutory right. Pre- and post-judgment amendments to correct technical mistakes or omissions in process or jurisdictional allegations should be freely allowed, mainly for the purpose of correcting the record.³⁶ But no suit should be dismissed or judgment avoided for some uncorrected technical error which has no bearing on the rights of the parties or the effective administration of justice.³⁷

Fourth, all statutes dealing with service, venue and jurisdiction of persons and property should be consolidated into chapters dealing generally with all civil actions.³⁸ Special provisions in code chapters dealing with specific causes of action, such as the automobile venue provision, section 4515.01, OHIO REVISED CODE, construed

³⁴ In *Mason v. Waters*, 6 Ohio St.2d 212, 217 N.E.2d 213 (1966) it was held that the savings statute, OHIO REV. CODE ANN. § 2305.19 (Page 1953), could not extend the statute of limitations after a dismissal not on the merits unless defendant was effectively served with process within 60 days after plaintiff attempted to commence the action. However, the statute relied on in *Mason v. Waters* which equated an attempt to serve process with actual service, OHIO REV. CODE ANN. § 2305.17 (Page 1953) has been amended. As a result of the amendment the plaintiff in a case similar to *Hayslip* ought to be able to start over again under the savings statute. However, the effect of the amendment has not yet been judicially established.

³⁵ See pp. 146-50 *infra*.

³⁶ Compare *Center v. St. Peter's Episcopal Church*, 11 Ohio St.2d 64, 227 N.E.2d 599 (1967).

³⁷ See pp. 163-64 *infra*. Cf. Note, 3 COLUM. J. OF LAW & SOC. PROBS. 17 (1967).

³⁸ See pp. 134-35 *infra*.

in the *Hayslip* case, can lead to errors of oversight and other confusion.

Fifth, statutes dealing with service, venue and jurisdiction of person and property should be broadly drawn, consolidated, and read in conjunction with a liberal transfer provision, so that few highly specialized provisions for specific actions will be required. Thus, to use the problem of the *Hayslip* case again as an example, there is no reason why the service, venue and jurisdictional provisions of the long-arm statute could not serve fairly and effectively to cover automobile torts where defendants are non-residents, or why separate provisions for motor vehicle accidents are required. Special provisions should be reserved only for situations where important policies call for a different approach to these problems. On the whole, the need for detailed venue provisions to cover every situation is lessened substantially by the ease of transportation and communication between counties within the State and by the availability of depositions in lieu of oral testimony in appropriate cases.³⁹ Special provisions will become even less important if a statute is adopted providing for transfer to a more convenient forum when hardship or unfairness would otherwise result.⁴⁰

Sixth, in order to insure that substantive rights are not jeopardized by errors in securing service, laying venue or securing jurisdiction over persons or property, the savings statute⁴¹ should be amended to permit a plaintiff whose action has been finally dismissed for any of these errors to recommence his suit in the proper county or in the proper manner within a reasonable time after the dismissal has been communicated to him. Such commencement should be permitted in cases where the plaintiff's attorney was negligent as well as in cases where the error was the result of an honest mistake. In order to overcome any claim of hardship to defendants, however, the plaintiff should be charged with defendant's costs of seeking a dismissal and the costs of answering to the new action, including reasonable attorney's fees. Only in cases where plaintiff is shown to have brought the suit improperly in order to harass the defendant should the savings clause be unavailable to salvage plaintiff's case.⁴²

As a result of the advent of "long-arm" statutes, the broadened

³⁹ OHIO REV. CODE ANN. ch. 2319.06 (Page 1953).

⁴⁰ See pp. 148-49 *infra*.

⁴¹ OHIO REV. CODE ANN. § 2305.19 (Page 1953).

⁴² See pp. 137-38 *infra*.

savings clause should be construed to permit recommencement of a suit in Ohio within the savings period even where the first suit was brought in another State.⁴³ Thus, for example, a Pennsylvania citizen who brings a suit in Pennsylvania against an Ohio citizen honestly but mistakenly believing the Pennsylvania long-arm statute to be applicable, should not be barred by the Ohio statute of limitations if his Pennsylvania suit is later dismissed because the Pennsylvania statute cannot constitutionally be used to reach the Ohio defendant. Instead he should have the Ohio savings period within which to recommence his suit properly in Ohio. Hopefully, Pennsylvania will reciprocate for Ohio plaintiffs.

All of this may seem to some to be overly solicitous to plaintiffs whose lawyers make mistakes in commencing suit. However, it must be remembered that because of the vagueness of contemporary interpretations of due process even the best lawyer may not be able to tell in advance whether jurisdiction over the non-resident will be sustained under the Constitution.⁴⁴ In addition, it has long ceased to be appropriate for lawyers to treat litigation as a game where either party may win as a result of a technical error committed by the other's attorney. The policy that "there must be an end to litigation" should be tempered by fairness and common sense.⁴⁵ The public is not likely to tolerate for long any-

⁴³ It has already been construed to allow recommencement in state court where the original action was brought in the federal courts and dismissed for lack of diversity of citizenship. *Wasyk v. Trent*, 174 Ohio St. 525, 191 N.E.2d 58 (1963). See Note, 33 U. CIN. L. REV. 113 (1964). However, savings statutes of this type have usually been held inapplicable where suit is first brought in a sister state. *Id.* at 116. Cf. *Burnett v. New York Cent. R.R.*, 380 U.S. 424, (1964) (recommencement of FELA action in federal court allowed after dismissal in Ohio state court for improper venue).

⁴⁴ See Note, *Extraterritorial In Personam Jurisdiction: The Substantive Due Process Requirement*, 13 KAN. L. REV. 554 (1965). When the lack of precision in the constitutional criteria for due process is taken together with the absence of clear standards in the long-arm statute itself, the difficulty of predicting in advance whether jurisdiction will stick in a particular case creates a serious problem even for the most knowledgeable practitioner. That this problem actually exists is borne out by the unusually high number of jurisdictional dismissals which regularly find their way into the advance sheets.

⁴⁵ The objectives of statutes of limitations are not simply to end the possibility of litigation and put defendant's mind at ease or to protect the interests of persons who deal with the defendant. They are also designed to protect the defendant against having to defend a case when the witnesses cannot be located or identified because of the passage of time or when their memories have faded. However, the law has never been seriously concerned with faded memories or unavailable witnesses when the suit has been commenced within the limitations period, even though several years pass before

thing less. Any hardship or difficulty caused by lengthening the time within which suit can be brought can be overcome more fairly by assessing costs and attorney's fees and by permitting the taking of depositions to preserve testimony, than by dismissing for technical reasons the action of a plaintiff who believes that on the merits he has a just cause. Nor does an action of malpractice against the plaintiff's attorney provide an adequate remedy, since errors can be made honestly and non-negligently and, even if negligence is present, the client is not likely to learn of it.

B. *Process*⁴⁶

Although service of process (or other manner of giving notice) may be constitutionally required as a condition to the existence of power to render an enforceable decision, the basis of jurisdiction upon which that power rests must exist independently of service; it is elemental that serving process upon a defendant will not confer jurisdiction over that defendant or his property unless he or his property are present within the State, he is domiciled within the state, he consents or he has other contact with the State sufficient to satisfy the requirements of *International Shoe* and its progeny.⁴⁷ The major purpose of process is simply the fulfillment of constitutional requirements of notice of suit—apprising the defendant that he is being sued, and giving him an opportunity to defend.⁴⁸ Rules relating to service of process, however, have often been used to accomplish other purposes, such as determining

it comes to trial. The reason, presumably, is because the defendant has been notified of suit early enough to begin to marshal his evidence and his witnesses and possibly to perpetuate testimony, or take depositions, before witnesses disappear or memories fade. It would be consistent with this latter reason to allow the savings statute to operate where defendant receives credible notice of a law suit within the limitations period (including the one year extension for service granted where plaintiff filed his suit within the limitations period, OHIO REV. CODE ANN. § 2305.17 (Page 1953)) even though there is a failure to comply with the strict requirements of the statutes dealing with commencement, process, service or return of service. Cf. *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428-30 (1964); Callahan, *Statutes of Limitations—Background*, 16 OHIO ST. L.J. 130 (1955).

⁴⁶ See generally *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Milliken v. Meyer*, 311 U.S. 457 (1940); *Sunderland, The Problem of Jurisdiction*, 4 TEX. L. REV. 429, 439-449 (1926); Comment, *Personal Service of Process—An Outdated Concept*, 28 U. PITT. L. REV. 319 (1966).

⁴⁷ See *Kurland, The Supreme Court, The Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); Note, *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

⁴⁸ See JAMES at 649-53.

venue,⁴⁹ or controlling the territorial authority of sheriffs and other officers.⁵⁰ But, from the point of view of simplicity, convenience and fairness, these other purposes could be better served by statutes and rules dealing expressly with venue and the authority of sheriffs. Eliminating these considerations from the statutes dealing with service of process would permit concentration exclusively upon state and federal constitutional requirements. And, if rules requiring strict construction of process requirements were also rejected, a relatively simple, understandable and easily applied statutory framework might be developed, as follows.

1. Contents

Summons issued by State courts need contain only constitutionally required captions, seals and signatures plus the name of the plaintiff or plaintiffs, the designation of the court, the name of defendants, the nature and amount of the claim (both of which might be satisfied by attaching a copy of the petition), and the date by which the defendant must respond or suffer a default judgment. Apart from specific constitutional requirements, the precise wording of the summons should be of no consequence so long as it, together with the attached petition, substantially provides the listed information.⁵¹

2. Territorial limitations upon service

Summons issued out of a court in one county should be effective to serve defendants anywhere in the State and, indeed, if jurisdiction is based upon a relationship with the State other than mere presence of the defendant in the State, anywhere in the world.⁵²

3. Effect of actual notice

Irregularities in service or, indeed, failure of service (such as service by an unauthorized official or service of an incomplete or improperly worded summons) should never defeat jurisdiction if the defendant had sufficient contacts with the State to otherwise

⁴⁹ See OHIO REV. CODE ANN. § 2307.39 (Page 1953) (venue proper where defendant summoned). The Ohio statutes also create a difficult situation where the validity of summons depends on the propriety of venue, OHIO REV. CODE ANN. § 2703.04 (Page 1953).

⁵⁰ Cf. *Mason v. Waters*, 6 Ohio St.2d 212, 217 N.E.2d 213 (1966).

⁵¹ See pp. 163-64 *infra*.

⁵² See p. 165 *infra*. See MICH. GEN. CT. R. of 1963, R. 105.9 which provides, in part: "There is no territorial limitation on the range of service of . . . notice."

establish jurisdiction *and* if defendant had actual, credible, notice of the suit and a reasonable opportunity to defend.⁵³ Here the burden of proving actual, credible notice, where official service failed or was defective, should rest with the plaintiff.

4. Mode of service

Service could be made in any manner reasonably calculated to give defendant notice and an opportunity to defend. Various methods would include, at plaintiff's option, personal service⁵⁴ by an authorized official or a disinterested adult, leaving at defendant's usual place of residence, registered or certified mail to places of usual residence or usual place of business or, in certain situations where defendant's address was unknown and undiscoverable in the exercise of reasonable diligence, publication alone. In addition, plaintiff should be permitted to use other, more unusual, methods, such as telegraph or telephone, with the court's permission if good cause can be shown. Special presumptive weight, however, might be given to the return of service of a sheriff, his appointee, or other qualified officer, while the return of a private person should be made under oath.⁵⁵

C. Venue

In spite of widespread acceptance of the much-mooted distinction between venue—a privilege to sue or be sued in a particular locality⁵⁶—and jurisdiction—the power of a court to hear and determine a case on its merits,⁵⁷ there is good reason to question its viability. First, Ohio courts have frequently tended to confuse the two concepts by attaching jurisdictional consequence to defects of venue.⁵⁸ Second, to the extent that a court must dismiss a case on

⁵³ See Sunderland, *The Problem of Jurisdiction*, 4 TEX. L. REV. 429, 443-9 (1926). This would all but eliminate special appearances to attack technical defects in service since a special appearance would ordinarily indicate that defendant had actual, credible notice of the suit.

⁵⁴ See Comment, *Personal Service of Process—An Outdated Concept*, 28 U. PITT. L. REV. 319 (1966). The author suggests that personal, in-hand, service is outmoded and should be replaced routinely by certified mail.

⁵⁵ See text *infra* pp. 166, 171-72.

⁵⁶ See generally Ehrenzweig, Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307 (1951).

⁵⁷ Cf. *Neirbo v. Bethlehem Shipbuilding Co.*, 308 U.S. 165 (1939); *Loftus v. Pennsylvania R.R.*, 107 Ohio St. 352, 140 N.E. 94 (1923), *petition for writ of error dismissed*, 266 U.S. 639 (1924).

Although there are also differences between "subject matter" jurisdiction and "personal" jurisdiction, both as to definition and ability to waive, there is no need to refer to those well-known differences for the purpose of this discussion.

motion because of improper venue as established by legislative fiat, that court has no "power" to hear and determine the case. The consequences, except perhaps for the right to collaterally attack the judgment, may be exactly the same as if the court lacked jurisdiction. And where, as in Ohio, the courts expressly denominate improper venue in certain actions as a jurisdictional defect,⁵⁹ a more traditional difference—that objections to venue may be waived if not properly raised while jurisdictional defects may not—may be dispensed with⁶⁰ and a judgment rendered in an improper venue subjected to collateral attack.⁶¹ This confusion may suggest that the "power-privilege" distinction is inaccurate, useless and perhaps dangerous as a conceptual tool, constituting a trap for the unwary which ought to be discarded. Alternatively, the rules of venue might be altered and clarified, at the very least to make them coincide more closely with what they really are—legislative determinations of the most fair and convenient place for suit. On rare occasions the location of suit may be a matter of such concern to the legislature as to lead it to withdraw decisional power from courts other than those in specific locations.⁶² Perhaps in such cases the legislature should *expressly* withdraw jurisdiction of the subject matter—competence—from courts in all other localities. The statutes accomplishing this purpose should be removed from the venue section and included in the chapter dealing with the subject matter jurisdiction of the courts or the chapter which creates the cause of action, if a statutory claim, and should be worded in terms which unequivocally demonstrate the jurisdictional nature of the rule, *e.g.*:

No court other than a court located in X county shall have power to entertain a civil suit involving a claim against
 to recover or to enter a

⁵⁹ See generally Wills, *The Effect of Improper Venue Upon Jurisdiction of the Person and Jurisdiction of the Subject Matter*, 11 OHIO ST. L. J. 291 (1950).

⁶⁰ *Id.*

⁶¹ See *Baltimore & O. R.R. v. Hollenberger*, 76 Ohio St. 177, 81 N.E. 184 (1907), discussed in Wills, *supra* note 58.

⁶² RESTATEMENT, JUDGEMENTS § 11 (1942).

⁶³ See, *e.g.*, OHIO REV. CODE ANN. § 5501.18 (Page 1964), which limits venue in actions against the director of highways to Franklin County or, in an action to prevent the taking of property without due process, to the county where the property is located.

judgment in such suit, and any judgment therein shall be void.

Having thus withdrawn truly jurisdictional rules from the section dealing with venue,⁶³ the legislature should then deal with its venue provisions in a manner designed to accomplish their legitimate purpose.

As already mentioned, venue in its accepted contemporary meaning is simply a legislative determination that certain localities are the appropriate places for trial of certain classes of cases. Generally speaking "appropriateness" is and should be determined by a careful legislative balancing of the convenience of the parties, witnesses and the courts in cases of each general class.⁶⁴ It must be recognized, however, that actual controversies may present circumstances in which the legislatively established venue becomes a most inconvenient place for the trial of a particular lawsuit. Such inconvenience may impose an undue burden upon one or both parties, the witnesses or the trial court. For this reason the legislature should permit suits to be brought in or transferred to localities other than those expressly enumerated in the venue statutes when serious inconvenience to the plaintiff, to the defendant, or to the witnesses would follow from suit in a specified county and if suit in the non-specified locality would not unduly burden the court or cause serious inconvenience to the opposite party.⁶⁵ Furthermore, one factor which might be considered in determining whether to transfer to a non-specified county is the extent of calendar congestion and delay in reaching trial in the forum and in other courts.⁶⁶

Abuse of a transfer provision might be avoided, first, by providing for the payment of costs of transferring the case to a proper

⁶³ No attempt has been made in this article to locate and deal with such venue rules. In the absence of legislative action making such rules exclusive, plaintiff would be able to use the general venue rules as well as the specific section if the revision proposed here were adopted.

⁶⁴ Occasionally, venue statutes may unduly favor the convenience of one kind of party—perhaps local residents or special interest groups—over another. Should such discrimination create serious hardship or unfairness to the non-favored party, a constitutional claim may be asserted. Cf. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (convenience to parties a factor in determining whether due process has been served); B. Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 268 (1959) in *SELECTED ESSAYS ON THE CONFLICTS OF LAWS* 283 (1963).

⁶⁵ See text *infra*, pp. 147-50.

⁶⁶ See text *infra*, pp. 149-50. Cf. Miller, *A Program for the Elimination of the Hardships of Litigation Delay*, 27 OHIO ST. L.J. 402, 415 (1966).

county, including reasonable attorney's fees, if the action upon defendant's motion is transferred to a locality authorized in the statute after being brought by plaintiff in a non-specified county.⁶⁷ Second, by adopting venue provisions sufficiently broad and with sufficient choice of locality to cover most of the potentially convenient locations.⁶⁸ It must be recognized that there are some actions in which no one county can be called *the* single most convenient place of suit, and where suit in any one county will result in some kind of inconvenience. Thus, if an automobile accident occurs in county *A* as a result of negligent repair or maintenance in county *B*, and defendant resides in county *C* and injured plaintiff resides and receives extensive post emergency treatment for his injuries in county *D*, witnesses may have to be drawn from all four counties. The legislature, in this situation, might well designate the county of defendant's residence (*C*), and the county or counties where any part of the cause of action arose (*A* or *B*)⁶⁹ as the counties of proper venue, leaving it for plaintiff to decide to bring the suit in county *D* (not specified in the statute) if he believes that medical testimony as to his injuries and treatment will constitute a major part of the trial and, perhaps, if the injuries are such as to prevent him or any of his key witnesses from traveling to counties *A*, *B*, or *C*. The chances are, however, that unless the prosecution of the suit in any county other than *D* will cause plaintiff serious inconvenience, he will bring suit in *A*, *B*, or *C* in order to avoid the possibility of a transfer to one of those counties with attendant costs.

The foregoing scheme, it should be noted, necessarily involves two further recommendations which are consistent with the concept of venue as a legislative generalization of convenience and which are vital if the rules of venue are to be of assistance in achieving justice. Places of suit which bear no *necessary* relationship to anyone's convenience, such as the place where the defendant is summoned, or some arbitrarily designated county, should either be eliminated from the venue statutes as proper places for suit or left as a last resort.⁷⁰ Unless this is done the transfer motion

⁶⁷ See text *infra* pp. 150-51. Cf. WIS. STAT. ANN. § 262.20 (1967 Supp.).

⁶⁸ See text *infra* pp. 147-48.

⁶⁹ It is recommended that, for purposes of venue, the county where any part of the cause of action arose be liberally interpreted to include any county in which activity occurred which gave rise to a cause of action; even though the cause of action arose, in a technical sense, in another county.

⁷⁰ See text *infra* p. 148.

might be called into use more often than would occur if suit were brought in a county which has a rational relationship to the parties or action. Furthermore, unless there is no other convenient forum there is no excuse for the inclusion of such counties as places of proper venue. More importantly, the remedy for improper venue, except perhaps in rare cases when bad faith and harassment are shown, should be a transfer to a proper venue and not a dismissal.⁷¹

D. *Jurisdiction of the Person*

The recent passage of a "long-arm" statute has done much to modernize the jurisdictional reach of Ohio courts over non-residents.⁷² Two problems which remain for practitioners are: (1) other, older statutes overlap and perhaps conflict with the provisions of the long-arm statute⁷³ and (2) the interpretation of the statute and its application to particular cases may be subject to doubt.⁷⁴ The first factor can be dealt with effectively either by repealing inconsistent jurisdictional statutes or by adopting a statutory rule which requires the application, in case of a conflict, of the statute which upholds the exercise of jurisdiction—normally the long-arm statute.⁷⁵ In either case a plaintiff's attorney would no longer have to fear the existence of a statute with a less expansive reach. The second factor may be a consequence of either a niggardly judicial interpretation of legislative intent or the possibility that the long-arm statute, as applied to a particular case, may violate defendant's due process rights. Although this problem may only arise on rare occasions, and although there are more or less cumbersome ways of avoiding the problem—as by suing the defendant concurrently in a court where personal jurisdiction is clearly proper—the danger is that an unsophisticated attorney, taking the statute at face value, may not be aware of the existence of a problem when he commences suit, and may not discover the dimension of his mistake until after the limitations period has expired. Absent interstate compacts or federal legislation allowing transfer from one state to another,⁷⁶ there is no sure-fire way to deal with this problem. Making the Ohio "savings" statute applicable to such cases

⁷¹ See text *infra* pp. 148-49. Cf. *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965).

⁷² OHIO REV. CODE ANN. § 2307.382 (Page 1953).

⁷³ Cf. OHIO REV. CODE ANN. § 2703.20 (Page 1953) (jurisdiction over non-resident owners or operators of motor vehicles.)

⁷⁴ See note 44 *supra*.

⁷⁵ See text *infra* p. 143.

and thus giving the plaintiff an additional period within which to sue will not work if the plaintiff has to commence suit anew in another state, since the full faith and credit clause does not oblige one state to apply the statute of limitations or "savings" statute of another.⁷⁷ A scheme with a moderate chance of success in preserving the plaintiff's rights is suggested by statutes adopted in Wisconsin⁷⁸ and recommended by the Commissioners on Uniform State Laws.⁷⁹ The local court can refuse to dismiss the case for lack of personal jurisdiction unless and until the defendant waives the statute of limitations and agrees to submit to jurisdiction and venue in a more convenient forum in another state.⁸⁰ Since constitutional limitations on jurisdiction are based on "fair play and substantial justice,"⁸¹ it may be argued that a defendant who refuses to accept a reasonable opportunity to have his case tried in a convenient forum ought not to be heard to complain if the original court in which he is sued—however inconvenient—proceeds to hear and determine the suit on the merits.⁸² Of course even this device may not help plaintiff if defendant fails to appear at all, for it may be argued that a non-appearance in a doubtful case gives the court no power to impose the conditions upon dismissal. But in that situation, at least, plaintiff ought to be on notice that something is amiss—particularly if the case is worth anything and plaintiff knows that defendant has had actual notice of the suit—and he should immediately commence suit in a more appropriate forum.

II. STATUTORY AMENDMENTS AND ADDITIONAL RECOMMENDATIONS

A. *General Provisions*

1. Reorganization of Statutes

As an aid to practitioners searching for the appropriate means of commencing suit and to avoid overlap and confusion, the statutory sections dealing with service of process, venue and jurisdiction of the person should be separated from one another but be drawn together under a single code title and under adjacent chapters. It is

⁷⁶ See Ehrenzweig, *supra* note 11, at 312-13.

⁷⁷ Cf. H. GOODRICH, *CONFLICT OF LAWS* 152 (1964); *RESTATEMENT OF CONFLICT OF LAWS* § 603 (1934).

⁷⁸ WIS. STAT. ANN. § 262.19 (1967 Supp.). See also EHRENZWEIG AND LOUISELL, *JURISDICTION IN A NUTSHELL* 85 (1968).

⁷⁹ Uniform Interstate and International Procedural Act § 1.05. This provision is derived from the Wisconsin act, *supra* note 78.

⁸⁰ See text *infra* pp. 143-46.

⁸¹ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁸² See text *infra* pp. 145-46.

suggested, therefore, that the general venue and jurisdiction provisions, sections 2307.32 - 2307.41, and other common venue provisions, such as those relating to actions in automobile accident cases, section 4515.01, and domestic relations cases, section 3105.03, be repealed and thus removed from the isolated titles in which they now appear, and the new and corrected rules be enacted to appear in Title 27.⁸³ Bases of jurisdiction should occupy chapter 2702, and venue chapter 2704.

2. Savings Statute

Recent applications of the Ohio savings statute⁸⁴ have unfortunately made it clear that relatively insignificant procedural errors which prevent plaintiff from acquiring jurisdiction over the defendant's person will not bring plaintiff within the benefit of the one year extension of the statute of limitations provided by this statute in cases where plaintiff fails "not on the merits." Thus, in *Mason v. Waters*,⁸⁵ where defendant's place of residence lay near the border between two counties, plaintiff in his praecipe mistakenly requested the issuance of a summons to the sheriff of the county other than the one in which defendant actually resided. This summons was served on defendant but was subsequently quashed, long after the statute of limitations on plaintiff's claim had run. The trial court and the court of appeals permitted plaintiff to proceed by alias summons under the savings statute; but the Ohio Supreme Court reversed a judgment for plaintiff on the ground that the savings statute is inapplicable where proper service is not achieved within the limitations period, holding that the acquisition of personal jurisdiction is an essential condition to its application. Subsequently, in *Baldine v. Klee*,⁸⁶ a common pleas court followed the reasoning of *Mason v. Waters* in a situation where the only defect was in stating the nature of the relief sought in plaintiff's praecipe and in the summons. The court held that plaintiff had not "attempted to commence his action" within the limitations period and, therefore, the dismissal of plaintiff's case was not a "failure otherwise than on the merits" within the coverage of the

⁸³ Entitled "Courts - General Provisions - Special Remedies."

⁸⁴ OHIO REV. CODE ANN. § 2305.19 (Page 1953). See generally Eastman & Kane, *Commencement of a Civil Action in Ohio for Application of the Statute of Limitations*, 16 OHIO ST. L.J. 140, 150-53 (1955).

⁸⁵ 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966), noted in 28 OHIO ST. L.J. 558 (1967). See also *Timens v. Bernard Pipe Line Co.*, 4 Ohio App.2d 249, 212 N.E.2d 73 (1965).

⁸⁶ 224 N.E.2d 550 (Ohio C.P. 1966).

savings statute. In both cases defendants were actually served with process, defective though such service might have been, within the period of the statute of limitations. As far as constitutional due process was concerned, defendants clearly had notice of the suits and a reasonable opportunity to defend.⁸⁷ Plaintiffs' errors consisted of failure to comply strictly with purely technical statutory requirements and, perhaps, understandable failures to act diligently to correct such errors after learning that defendants were moving to quash the summonses. There is absolutely no evidence in either case that defendants were prejudiced by plaintiff's technical errors. Furthermore, there is nothing to indicate that the legislature intended the statute of limitations to bar plaintiffs' claims where defendants get actual notice of suit, and thus have an opportunity to begin to marshal their evidence, before the limitations period expires.⁸⁸ Even the most meticulous attorney is likely to quail at the prospect of having an action dismissed with prejudice upon such technical grounds. There is strong reason, therefore, for bringing cases of this nature within the protection of the savings statute. And, since that statute is merely an extension of the statute of limitations and clearly within the legislative prerogative, there is no reason why jurisdiction over the person must condition its operation. Thus, in keeping with the Ohio Supreme Court's stated view that the savings statute "is a remedial statute and is to be given a liberal construction to permit the decision of cases upon their

⁸⁷ See *Baldine v. Klee*, 10 Ohio Misc. 203, 211, 224 N.E.2d 544, 550 (C.P. 1965).

⁸⁸ There is, however, something which indicates that the legislature was aware of the problem. OHIO REV. CODE ANN. § 2305.17 was amended effective October 30, 1965 to provide that an action is commenced

by filing a petition in the office of the clerk of the proper court together with a praecipe demanding that summons issue or an affidavit for service by publication, if service is obtained within one year.

This new section eliminated the language in the former section which the Ohio Supreme Court had apparently construed to mean that there could be no attempt to commence an action for purposes of the savings statute, unless plaintiff actually got service on defendant within 60 days of the date of summons. *Cf. Mason v. Waters*, 6 Ohio St. 2d 212, 217 N.E.2d 213 (1966). The effect of the amendment may be, and hopefully will be, to make the savings statute applicable even where defendant has not been properly served. Unfortunately, however, it is still possible for the court to hold, consistently with its reasoning in *Mason v. Waters*, that an action cannot fail, on the merits or otherwise, under the savings statute, unless it has been properly commenced, and that an action under the amended provision is not commenced unless valid service is obtained within one year after filing a praecipe and petition. See also *Kossuth v. Bear*, 161 Ohio St. 378, 119 N.E.2d 285 (1954).

merits rather than upon mere technicalities of procedure,"⁸⁹ the following wording of OHIO REV. CODE section 2305.19 is recommended:

If in good faith plaintiff commences an action or attempts to commence an action in any court within the limitations period there applicable and,

- (a) if the action fails,
- (b) if a judgment for plaintiff is reversed, or set aside in any direct or collateral attack,
- (c) if the attempt to commence such action fails, or
- (d) if the failure of such action or attempt is affirmed on appeal in any appellate court,

and if such failure, reversal or affirmance is otherwise than upon the merits and the time limited for the commencement of such action at the date of failure, reversal or affirmance has expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action against the same defendants, or if the law allows, their successors, within one year after notice of such reversal, failure or affirmance, whichever is the latest.

Upon motion of the defendant in the new action the court may award such actual costs as are just, including reasonable attorney's fees, to recompense the defendant for any expense, hardship or inconvenience suffered as a result of plaintiff's failure or neglect to comply with any rule of practice or procedure.

This provision shall apply to any claim asserted in any pleading by a defendant. It shall not be necessary, in order for this provision to apply, for the failing party to appeal from the ruling of law or fact upon which such failure is based. A failure not on the merits shall include, but is not limited to, a defective praecipe or summons, service of summons by an improper officer or person, false or incorrect return of service, improperly laid venue, failure of subject-matter jurisdiction and failure to subject defendant or defendants to the jurisdiction of the court.

This section shall be construed liberally to avoid the consequences of any error or defect in the proceedings which does not affect the substantial rights of the parties.

The "good faith" requirement in this proposed section is designed only to exclude situations in which a suit has been commenced or an abortive attempt to commence suit has been made without regard for the applicable rules of procedure in order to harass or trick the defendant or delay the actual commencement

⁸⁹ *Cero Realty Corp. v. American Mfrs. Mut. Ins. Co.*, 171 Ohio St. 82, 167 N.E.2d 774 (1960).

of suit by exploiting this section. In such cases, the burden should lie with the defendant to establish, either by showing the gross and obvious nature of the error or by proof of plaintiff's actual intent, that plaintiff's attempt was other than in good faith. This exception should not be resorted to unless the court is satisfied that good faith was not present.

The application of the section is not to be limited to failure caused by the enumerated errors, but is to apply to any failure caused by a procedural error not affecting the party's substantial rights. This might well include, for example, dismissals for technical pleading errors or for misjoinder or non-joinder of parties or claims. In any event the section calls for a liberal construction, and it shall no longer be necessary that plaintiff secure jurisdiction over defendant's person before it becomes applicable.⁹⁰ Plaintiff need not appeal the adverse ruling of fact or law in order to get the benefit of this section,⁹¹ but if he or the defendant does appeal and plaintiff loses not on the merits at the appellate stage, the one year extension shall run from the date that plaintiff receives notice of his failure.⁹²

That portion of section 2305.19 dealing with service upon a

⁹⁰ *Mason v. Waters*, 6 Ohio St.2d 212, 217 N.E.2d 213 (1966). Furthermore, it should not make any difference whether the applicable statute of limitations is substantive or procedural. *Cf. Burnett v. New York Cent. R.R.*, 380 U.S. 424, 425-30, especially n. 2, 427 (1965). *Contra, Alakiotis v. Lancione*, 12 Ohio Misc., 257, 232 N.E.2d 663 (C.P. 1966).

⁹¹ Ordinarily this provision should not be used to allow a recommencement where the original failure though on the merits was clearly erroneous. In such cases plaintiff's only recourse is to appeal the erroneous judgment before it becomes final. *Cf. La Barbera v. Batsch*, 10 Ohio St. 2d 106, 227 N.E.2d 55, 62 (1967). But as in the case of *La Barbera v. Batsch*, where the original action was dismissed because of the statute of limitations, and where the dismissal was clearly erroneous because the statute applied was superceded retroactively by a more expansive statute, a different result suggests itself. While such a dismissal based on the statute of limitations may be characterized as "on the merits" for historical or policy reasons, *id.* at 114-15, 227 N.E.2d at 62-63, the fact remains that such a dismissal erroneously cuts off the plaintiff's substantive rights without a hearing of the merits of his claim. This is violative of the express objective of the proposed savings statute as set forth in the rule of construction. Furthermore, the proposed statute does not require the plaintiff to appeal from a dismissal not on the merits before resorting to recommencement. These two points suggest that the policy of the proposal would best be served by treating dismissals based on erroneous interpretations of the statute of limitations as "not on the merits" and by allowing plaintiff to recommence without regard to the *res judicata* effect of his failure to appeal, at least in cases where defendant cannot show actual prejudice to his rights.

corporation in receivership is omitted since it seems to be inappropriately placed in the savings statute.⁹³ Whether or not plaintiff can proceed within the savings statute against successors of the original defendant, such as personal representatives or receivers, should depend entirely upon appropriate "survival" statutes. Being a matter involving different policy considerations it has no place in a statute designed to extend the limitations period in order to avoid unfair loss of substantive rights.

B. *Special Provisions*

1. Personal Jurisdiction

As suggested above, all of the provisions relating to jurisdiction should be marshaled together into chapter 2702 of the OHIO REVISED CODES. The following specific provisions are recommended:

2702.01. Definitions.

As used in sections 2702.01 to 2702, inclusive, of the Revised Code, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, *whether or not a citizen or domiciliary of this state and whether or not organized under the laws of this State.*

This section is essentially the same as current OHIO REV. CODE section 2307.381, except that the italicized language has been changed to reflect the reorganization of the statute and the fact that the chapter on jurisdiction will apply to non-residents as well as residents. It carries precisely the same meaning as section 1.01 of the Uniform Interstate & International Procedure Act from which section 2307.381 was adopted.⁹⁴

⁹³ In rare cases this provision could permit a suit to be recommenced several years after the original action was brought. For example, a party could appeal a decision on jurisdiction under a long-arm statute all the way to the United States Supreme Court. If the Supreme Court ruled that there was no jurisdiction, the plaintiff would have one additional year within which to recommence his action. It is suggested, however, that the potential hardship to defendant, who, after all, had notice of the action before the limitations period expired, is outweighed by the potential hardship to a plaintiff who has already invested a great deal in litigation expenses if his claim is then barred. If the proposals in this paper are adopted, the problem should almost never arise in actions originally commenced in Ohio. In any event, similar delay is possible under the current statute.

⁹⁴ Perhaps that language should be re-enacted in chap. 17.

⁹⁵ See PROCEEDINGS 220 (1962).

2702.02. General Personal Jurisdiction.⁹⁵

A court may exercise personal jurisdiction over a person as to any cause of action if such person is

- (1) domiciled in the State,
- (2) other than a natural person and organized under the laws of the State,
- (3) systematically and continuously carrying on substantial business within the State,
- (4) personally present within the state, or
- (5) if such person consents to the jurisdiction of the court, to the extent authorized by the consent.

This section purports to include all of the constitutionally permissible bases of exercising unlimited general jurisdiction.⁹⁶ It contains no ground of jurisdiction which is not already well known and well accepted throughout the United States. By adding this provision, however, the need to have separate provisions for general personal jurisdiction in other sections of the OHIO REV. CODE is entirely obviated, and unnecessary confusion is eliminated.

Under this section the court has jurisdiction over the person sufficient to adjudicate any cause of action, whether or not it has any connection with defendant's activities in Ohio.⁹⁷ This "general" jurisdiction, of course, does not constitute an expansion of the right to sue a defendant in unrelated actions beyond that generally permitted now, although, in effect, it does bring the definition of what will constitute "doing business" for purpose of suit against a foreign corporation on a non-forum related cause of action into line with what is constitutionally permitted by the *International Shoe* case.⁹⁸ The only exception to general jurisdiction over unrelated causes in this section is contained in subsection (5), where it is possible for defendant to limit his consent to be sued, as in an agreement between plaintiff and defendant, to specific matters. The effect of a general appearance, however, will remain unchanged. In its major effect, therefore, this section will merely codify, consolidate and clarify existing common law rules which might otherwise be difficult to understand or to locate. Not only is it in agreement with the uniform laws, but it is similar to provisions already adopted in

⁹⁵ This proposal was adapted from the UNIFORM INTERSTATE & INTERNATIONAL PROCEDURE ACT § 1.02 and the MICH. REV. JUDIC. ACT of 1962, chap. 7.

⁹⁶ See Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-44 (1966).

⁹⁷ *Id.*

⁹⁸ *International Shoe Co. v. Washington*, 326 U. S. 310 (1945).

other States which have attempted to clean up their statutory rules in this area.⁹⁹

2702.03 Limited Personal Jurisdiction.¹⁰⁰

(A) *If permitted by the Constitution of the United States and of this State*, a court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

- (1) Transacting any business in this State;
- (2) Contracting to supply services or goods in this State;
- (3) Causing tortious injury by an act or omission in this state;
- (4) Causing tortious injury in this state by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
- (5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
- (6) Having an interest in, using, or possessing real property in this State;
- (7) Contracting to insure any person, property, or risk located within this State at the time of contracting;
- (8) *Acting as a director, manager, trustee, or other officer of any corporation incorporated under the laws of, or having its principal place of business within this State;*
- (9) *Conducting activity or having an interest in, using, or possessing real or personal property within the State which is subject to tax or other assessment by this State or any subdivision thereof, in an action to recover such tax or assessment.*

(B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

The only changes to current OHIO REVISED CODE section 2307.382 are the additions noted by italics. The purpose of the first change, a reference to possible constitutional limitations on the exer-

⁹⁹ Compare, for example, MICH. REV. JUDIC. ACT of 1961, §§ 600.701, 600.711, 600.721, and 600.731.

¹⁰⁰ See generally Comment, *Jurisdiction Under New Ohio "Long-Arm" Statute - Problems of Interpretation and Application*, 35 U. CIN. L. REV. 157 (1966).

cise of jurisdiction, is designed to reflect the fact that such limitations may exist, that by virtue of the uncertainty as to the precise boundaries of the due process clause the statute may be unconstitutional as applied to some situations which clearly fall within the statutory language and to serve as a caveat to the attorney who might not be familiar with *International Shoe* and its progeny. By including such a caveat plaintiff's attorney may be alerted to the advisability of avoiding a doubtful use of this statute which might lead to lengthy proceedings culminating finally in a dismissal, and of commencing suit in a court that clearly has jurisdiction on more conventional grounds.

The second addition, sub-paragraph (8), is designed to facilitate derivative stockholders suits wherein non-resident officers of the domestic corporation might have to be joined as parties defendant.¹⁰¹ The Commissioners of Uniform State Laws suggest that such provision be included in the statutes dealing with corporations,¹⁰² but the philosophy of the revision proposed here is to consolidate all jurisdictional provisions into one chapter of the OHIO REV. CODE for ease of reference.

The third addition, sub-paragraph (9), might constitute a useful and significant addition to the jurisdiction of Ohio courts over non-residents. It will be recalled that *International Shoe v. Washington*¹⁰³ was itself a suit by the State of Washington brought in Washington to recover an unemployment compensation assessment against a Missouri corporation. Based on the rationale of *International Shoe* it would seem to follow that obtaining personal jurisdiction in Ohio over a non-resident who has left the State in order to recover taxes incurred while defendant was conducting taxable activities within the State should not offend the Supreme Court's notion of "fair play and substantial justice." Whether and to what extent such a provision will make it easier for Ohio taxing authorities to collect such taxes¹⁰⁴ or prove a boom to Ohio's coffers are

¹⁰¹ See MICH. REV. JUDIC. ACT of 1961, MICH. COMPILED LAWS ANN. § 600.705(6).

¹⁰² See PROCEEDINGS, *supra* note 33, at 224.

¹⁰³ 326 U.S. 310 (1945).

¹⁰⁴ Existing provisions of the Ohio "long-arm" statute probably establish jurisdiction to adjudicate tax claims over non-residents in most of the situations which might arise. However, the proposed special section is designed to consolidate such jurisdiction into one section, to cover all situations in which jurisdiction is constitutionally permissible, and to alert Ohio tax collectors to the possibilities presented by bringing suit against nonresident taxpayers in local Ohio courts. Cf. OP. ATT'Y. GEN. OF OHIO 349 (1963); *Ohio v. Kleitch Bros.*, 357 Mich. 504, 98 N.W.2d 636 (1959).

matters which cannot be predicted. The possibilities, however, are clearly present, since the ease of securing a judgment will be much enhanced.

2702.04. Other bases of jurisdiction unaffected.

A court of this State may exercise jurisdiction on any other basis authorized by law. *Where sections of the code other than sections 2702.01 to 2702.04 provide additional bases of jurisdiction over persons, property or status, such sections shall not be deemed exclusive unless expressly so provided therein.*

While it is one of the purposes of this revision to consolidate all statutory provisions relating to jurisdiction of the person, other means of obtaining jurisdiction in rem or quasi-in-rem are left untouched.¹⁰⁵ Furthermore, even if all scattered provisions for in personam jurisdiction are repealed, as recommended, there is no guarantee that isolated provisions might not be passed in the future. This revision of OHIO REV. CODE section 2307.385, therefore, is designed to leave other bases of jurisdiction permitted by law intact. The language of the first sentence is exactly the same as that recommended by the Commissioners of Uniform State Laws,¹⁰⁶ which was altered when the long-arm statute was first passed in Ohio. The second sentence, entirely new, is designed to insure that more limited provisions for securing jurisdiction which might find their way into the statutes will not ensnare the unwary.¹⁰⁷ They will not be deemed the exclusive method unless the legislature so provides by express language. Thus, if such statutes are present the attorney will not ordinarily be precluded from using these general jurisdictional statutes to secure personal jurisdiction.

2702.05 Jurisdiction lacking or doubtful.

When the court finds that exercise of jurisdiction over defendant would be improper under the foregoing provisions the court shall (1) dismiss the action but, (2) if it should appear that the failure of jurisdiction is caused by doubtful adequacy

In an interview with the Chief of the Income Tax Division of the City of Columbus, Mr. Raymond Posgay, my research assistant for this article, learned that the problem of collecting income taxes from non-residents who have left the city is not a serious one. The general categories are three: university students, federal employees and transients moving from job to job. About half of the cases involve amounts that are not worth going to court for. The total annual loss to the city is about \$8,000-\$10,000. Nonetheless, the director agreed that jurisdiction to sue non-residents in local courts might ease his collection problem.

¹⁰⁵ See OHIO REV. CODE ANN. ch. 2715 (Page 1953).

¹⁰⁶ UNIFORM INTERSTATE & INTERNATIONAL PROCEDURE ACT § 2.05.

¹⁰⁷ Cf. *Hayslip v. Conrad Produce, Inc.*, 10 Ohio Misc. 155, 226 N.E.2d 839 (C.P. 1967).

of contacts between defendant and this State or by inconvenience to defendant if the action be prosecuted in this State, the court upon plaintiff's request shall retain the action for trial unless defendant consents to the jurisdiction of the court, waives any objections to venue and waives the defense of the statute of limitations as to the action in that forum which the court deems to be the most convenient forum outside this State. In such case the court shall not dismiss the action, which shall be stayed, until the court receives notice by affidavit that plaintiff has recommenced the action in the convenient forum and defendant has there submitted to the jurisdiction and waived objection to venue and the applicable statute of limitations, or that plaintiff has not recommenced the action in the convenient forum within 60 days after the order staying the original action.

The failure of defendant in such case to agree to the recommencement of suit in the designated convenient forum or to fulfill the conditions, aforesaid, shall constitute a waiver of any objection to the jurisdiction of the court over defendant's person.

In staying the proceeding pending recommencement in another forum, the court may award to the defendant such actual costs, including attorney's fees, as the court deems reasonable and just to compensate the defendant for such inconvenience and expense as he may have been caused by the commencing of suit in an inconvenient forum.

Section (2) of this section shall be inapplicable to a defendant who has failed to appear specially or otherwise.

This section is entirely new.¹⁰⁸ It is intended to deal with a situation in which defendant's contacts with the State of Ohio are too insignificant to sustain the jurisdiction of Ohio courts over the defendant's person as to plaintiff's cause of action. If defendant has no contacts with the State, and if no other bases of jurisdiction are present, the court shall dismiss the action. The same result would also be required where defendant's contacts with the State are *clearly inadequate* to sustain jurisdiction. Such would be the case, for example, where plaintiff seeks to acquire jurisdiction over a non-resident corporation having no contacts with the State by serving process personally upon a non-resident officer who happened to be visiting friends in the State.¹⁰⁹ In these situations the plaintiff would seem to have no colorable basis for asserting jurisdiction, and it would tend to work injustice and permit harassment if jurisdiction were created *deus ex machina*. But, where defendant's con-

¹⁰⁸ The general idea, however, is not new. See WIS. STAT. ANN. § 262.19 (1967 Supp.) and Ehrenzweig at 313.

¹⁰⁹ See *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915); RESTATEMENT OF JUDGMENTS § 31 (1942).

tacts with the State are of doubtful adequacy—for example, where they seem to fall within the language of the “long-arm” statute but may nevertheless fail to pass constitutional muster under the decisions, as where it is not clear that defendant is “purposefully availing” himself of the privilege of conducting activity within the State,¹¹⁰ then it does not seem unreasonable to require him to choose whether to assent to transfer to a convenient forum outside the State or to proceed with the trial in Ohio. At least it would not seem unfair if defendant had already appeared specially to contest jurisdiction and was permitted to exercise his option. There would seem to be little question as to the constitutionality of providing such an option since, in *York v. Texas*,¹¹¹ the Supreme Court upheld general jurisdiction, without reference to defendant’s contacts with the State and without regard to defendant’s inconvenience, where he merely appeared specially to attack jurisdiction. A fortiori, there should be even less doubt under the proposed statute where defendant has the option of permitting transfer to a convenient forum.

The option provision will not apply, however, where defendant enters *no* appearance. Then perhaps the court should decide whether the defendant’s contacts are sufficient—difficult as that decision may be under the confusing authorities—and dismiss on his own motion or enter a default judgment for plaintiff. In the latter event the plaintiff may discover, when defendant collaterally attacks the judgment, that there was in fact no jurisdiction; but he may be saved by the savings statute¹¹² if he can then acquire jurisdiction in Ohio. Even if he cannot our sympathies need not run too strongly in his favor, for we can assume that if defendant had actual notice and failed to appear, the plaintiff should have been forewarned that jurisdiction was doubtful—especially if the matters in litigation were of any substance—and should have acted to commence suit in a place where jurisdictional doubts were not present.

It should be noted that the transfer option only applies if plaintiff so requests. In the usual case defendant will enter a plea or motion which raises the jurisdictional question and plaintiff will then have to request the transfer before the court dismisses. If plaintiff is unwilling to have the case transferred to a more con-

¹¹⁰ *Hanson v. Denckla*, 357 U.S. 235 (1958).

¹¹¹ 137 U.S. 15 (1890).

¹¹² OHIO REV. CODE ANN. § 2305.19 (Page 1953).

venient forum, then he will have to risk the possibility that the court will dismiss and the dismissal will be affirmed on appeal. If it is so affirmed, and if the only proper place to acquire jurisdiction is another State where no savings statute exists and which does not recognize the Ohio savings statute, then plaintiff may find himself absolutely barred by the other State's statute of limitations. Again, our sympathies are not likely to run in favor of such a plaintiff since adequate opportunity was provided to commence the suit in a more convenient forum.

The proposal also includes a section designed to compensate the defendant for the hardship and inconvenience of having to attack jurisdiction in an improper forum. If the transfer is ordered the judge may award reasonable costs, including attorney's fees, to the defendant to compensate him for his inconvenience. The determination of whether to award costs and what is a reasonable amount will be left to sound judicial discretion, but such questions as whether plaintiff acted in good or bad faith in bringing the action in Ohio, or whether plaintiff should have been aware of the doubtful adequacy of the contacts in this State, ought to be relevant.¹¹³

Lastly, this proposal deals with situations where jurisdiction is lacking or in serious doubt. While jurisdiction may turn out to be affirmed in doubtful cases, the major purpose of section (2) of this proposal is to encourage the plaintiff and defendant to permit transfer of the suit to a forum where such doubts will not exist and where, by definition, convenience and fairness will more clearly be served. This section may overlap, but it does not generally cover a subsequent proposal in the venue section,¹¹⁴ which will allow transfer to a more convenient forum within or without the State even where jurisdiction over defendant's person is clearly proper in the forum in which suit is originally brought. Such a statute, though somewhat similar in objectives to the instant proposal, is more appropriately placed in the venue section.

2. Venue

2704.01 Venue not Jurisdictional.

The provisions of this chapter relate to venue and are not jurisdictional. No order, judgment, or decree shall be void or voidable solely on the ground that there was improper venue.

¹¹³ Compare WIS. STAT. ANN. § 262.20 (1967 Supp.).

¹¹⁴ See text *infra* p. 149.

Section 2704.01¹¹⁵ is designed to set to rest the problems raised by Professor Wills in his 1950 article on Ohio jurisdiction and venue¹¹⁶: the only remedies for improper venue, which is merely a matter of convenience of location, will be those set forth specifically in this chapter. Thus, for example, if a case should be litigated in an inconvenient county within the state, and if the parties or the court should not seek to have the case transferred to a more convenient county, or if the court, in its discretion, refuses to transfer upon the request of one of the parties, a judgment rendered in the action will be valid and enforceable. Even if the court should abuse its discretion in refusing to transfer upon timely request, the judgment will only be subject to direct attack—by appeal—on this ground, and not to collateral attack when the judgment is sought to be enforced. In other words, in no event will a venue problem be treated as if it affected the subject matter jurisdiction or the personal jurisdiction of the court.

This clean separation of venue from jurisdiction is in accordance with enlightened practice followed in other States and in the federal system.¹¹⁷ It should remove a troublesome situation which has existed in Ohio jurisprudence for many years.

2704.02.¹¹⁸ Venue. Where proper.

Where practicable, every action shall be commenced and tried in a forum convenient to the parties and witnesses, where justice can be administered without prejudice or delay.

2704.03 Counties deemed convenient.

In any action, any one or more of the following counties shall be presumed to be convenient forums for the purpose of establishing proper venue under section 2704.02.

- (a) The county where the defendant resides;
- (b) The county where the defendant has his principal place of business;
- (c) A county where the defendant conducted activity which gave rise to the cause of action;
- (d) A county where defendant regularly and systematically conducts his business activity or, if a public officer,

¹¹⁵ Adapted from 28 U.S.C. § 1406(b) (1964) and Mich. Rev. Judic. Act. of 1961, MICH. COMPILED LAWS ANN. § 600.1601 (1968).

¹¹⁶ See Wills, *The Effect of Improper Venue Upon Jurisdiction of the Person and Jurisdiction of the Subject Matter*, 11 OHIO ST. L. J. 291 (1950).

¹¹⁷ *Supra* note 115.

¹¹⁸ The proposed venue statutes, OHIO REV. CODE §§ 2704.02-13, will first be presented in consecutive order without comment. Commentary and citations will follow *infra* at pp. 152-63.

where he performs his duties or holds office within the State;

- (e) If the subject of the action is real or tangible personal property, a county wherein the property, or any part thereof, is situated;
- (f) The county in which all or a part of the cause of action arose; or, if the cause of action arose upon a river, or other watercourse, or a road, which is the boundary of the State, or of two or more counties, in any county bordering on such river, watercourse, or road, and opposite to the place where the cause of action arose;
- (g) In an action against an executor, administrator, guardian, or trustee, in the county wherein he was appointed;
- (h) In actions for divorce, annulment or for alimony in the county in which the plaintiff is and has been a resident for at least ninety days immediately preceding the filing of the petition;
- (i) If there is no other available forum in paragraphs (a) through (h), in the county where plaintiff resides, has his principal place of business, regularly and systematically conducts business activity or, in a case where personal injuries suffered by plaintiff are at issue, in a county in which plaintiff received extensive medical treatment or was hospitalized incident to his cause of action;
- (j) If there is no other available forum in paragraphs (a) through (i) or in other sections of the Revised Code,
 - (1) in the county in which defendant has property or debts owing to him subject to attachment or garnishment,
 - (2) in the county in which defendant has appointed an agent to receive service of process or wherein such agent has been appointed by operation of law, or
 - (3) in the county in which defendant is summoned.

2704.04 Actions commenced in other counties.

Upon timely motion of any party in an action commenced in a county other than one enumerated in section 2704.03, or upon its own motion, the court shall transfer the action to a county presumed to be convenient under section 2704.03 unless plaintiff establishes that the original forum in which the action was commenced is itself a more convenient county than those enumerated in section 2704.03.

2704.05 Change of venue to county within the State.

Upon motion of any party or upon its own motion the court may transfer any civil action to any other convenient forum within the State

- (a) When it appears that a fair and impartial trial can-

- not be had in the county where the suit is pending; or
- (b) For the convenience of parties and witnesses, in the interest of justice without prejudice or delay.

2704.06 No convenient forum within this State.

In any action brought in a court of this State, if the court, upon motion of any party or upon its own motion, determines:

- (a) that the county in which the action is brought is not a convenient forum;
- (b) that there is no other convenient place for trial within this State; and
- (c) that there exists a convenient place for trial in another jurisdiction outside this State,

the court shall stay the action upon the conditions that defendant consents to jurisdiction and waives venue and the application of the statute of limitations to the action in that forum in another jurisdiction which the court deems to be the most convenient forum. If defendant agrees to the conditions the court shall not dismiss the action, but it shall be stayed, until the court receives notice by affidavit that plaintiff has recommenced the action in the convenient forum and defendant has complied with the conditions aforesaid, or that plaintiff has not recommenced the action in the convenient forum within 60 days after the effective date of the order staying the original action. If the defendant does not agree to or comply with the conditions aforesaid the court shall hear the action.

If the court determines that there does not exist a convenient forum in another jurisdiction, it may hear the action or dismiss, as the interests of justice require.

2704.07 Determining convenience.

For purposes of Revised Code sections 2704.02 through 2704.06 and 2704.08, in determining whether and to what extent a forum is convenient and whether a transfer would be in the interest of justice without prejudice or delay, a court may consider, among others, the following factors:

- (a) The ease of access to sources of proof of liability, damages and defenses in the forum and in other forums;
- (b) The availability of compulsory process for the attendance of unwilling witnesses in the forum and in other forums;
- (c) The availability of procedures for pre-trial discovery and depositions and the admissibility of depositions as evidence in the forum and in other forums;
- (d) The cost of obtaining attendance of witnesses and other evidence in the forum and in other forums;
- (e) The possibility of a view of the premises, if a view would be appropriate to the action, in the forum and in other forums;

- (f) Relative advantages and obstacles to fair trial in the forum and in other forums;
- (g) Relative expense to plaintiff and to defendant of prosecuting or defending the action in the forum and in other forums;
- (h) The motives of the plaintiff in bringing the action in the forum rather than in other available forums, and the motives of the defendant in seeking a transfer to another forum;
- (i) The delay, if any, in bringing the action to trial in the forum and in other forums;
- (j) In the case of jury trial, the relationship between the controversy and the community from which the jury may be drawn in the forum and in other forums;
- (k) The extent to which the law applicable to the case is governed by the law of the forum and other jurisdictions; and
- (l) The proximity of other forums to the forum.

In a suit brought in a county to which a presumption of convenience is applied under section 2704.02 of the Revised Code, the court shall give presumptive weight to the county in which suit is brought, but the court may determine that such county is not a convenient forum if, on balance, the relevant factors, such as those enumerated herein, preponderate heavily against such county and in favor of another forum.

2704.08 Multiple defendants and multiple causes of action.

In any action brought by one or more plaintiffs against one or more defendants involving one or more causes of action, the forum shall be deemed a convenient forum, and venue therein shall be proper, if the venue is proper as to any one party other than a nominal party, or as to any one cause of action. But the court, upon motion of any party or upon its own motion, may order a severance and transfer of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, involving one or more plaintiffs and one or more defendants, to a more convenient forum or forums, for the convenience of parties and witnesses in the interest of justice, pursuant to section 2704.07 of the Revised Code.

Neither the dismissal of any claim nor the dropping of any party except an indispensable party shall affect the jurisdiction of the court over the remaining claims or remaining parties.

2704.09 Costs.

In any action which is transferred, stayed, dismissed or retained for trial pursuant to Revised Code 2704.01 through 2704.08, the court in which the action was initially brought may award such actual costs, including attorney's fees, as the court deems reasonable and just:

- (a) to compensate a party for such inconvenience, expense and delay as he may have been caused by the commencement of suit in an inconvenient forum, or
- (b) to compensate a party for such inconvenience, expense and delay as he may have been caused by the bringing of a frivolous motion to dismiss or transfer under this chapter.

2704.10 Jurisdiction of transferee court; allocation of expenses; retransfer.

The court of the county within this State to which a transfer is made under any provision of this chapter shall thereupon have full jurisdiction of the subject matter of the action and the parties to the action. All court costs and charges of the action or part thereof transferred which are not paid by the parties prior to the transfer shall be charged and collected by the court to which the action is transferred. The court of a transferee county shall not re-transfer an action transferred to it to the transferor or any other court unless it finds that the transfer constituted an abuse of discretion by the transferor court. If the action is re-transferred to the transferor court, and if another judge is available, it shall be assigned for trial to a judge other than the judge who ordered the original transfer.

2704.11 Transfer of judgments in actions affecting real or tangible personal property.

When a civil action affecting the title to or possession of real or tangible personal property has been tried in a county other than the county in which all of the real or tangible personal property is situated, the clerk of the court, after final judgment therein, must certify under his seal of office and transmit a copy of the judgment to the corresponding court of any county in which real or tangible personal property affected by the action is situated. The clerk of the court receiving the copy must file and record the judgment in the records of the court, designating it as a judgment transferred from (naming the court).

2704.12 Discretion of Judge.

The decision of a court transferring, dismissing, staying or refusing to transfer, dismiss or stay an action or part thereof under Revised Code 2704.01–2704.12 or awarding costs under section 2704.09, shall be within the sound discretion of the trial judge, and shall not be reversed except for abuse of such discretion.

2704.13 Other venue statutes.

Where sections of the Revised Code other than § 2704.01 to 2704.12 provide for venue in specific civil actions, the places there set forth shall be presumed to be convenient forums as under section 2704.03 hereof, but shall not be deemed the exclu-

sive place of venue unless the applicable section expressly so provides.

(a) *The General Pattern*

Despite the apparent complexity of these proposed statutes the intended pattern is fairly simple and straight-forward. The basic objective is to have every lawsuit tried in a convenient forum. But, because it is not always possible to determine in advance which county or counties will prove convenient for the trial of a particular lawsuit or even for a particular class of lawsuits,¹¹⁹ the traditional venue statute—which has attempted to make that determination by legislative fiat—has been scrapped in favor of a more flexible approach. Nonetheless, the useful features and some of the preferences of the traditional approach—such as holding most trials in a forum convenient to defendant¹²⁰ or allowing suit in a real action to proceed in a county where the land is located¹²¹—are included, although not necessarily made mandatory.

A secondary objective incorporated in the proposal is to relieve calendar congestion and delay by allowing a judge to take the condition of the dockets in his county and other counties into consideration in determining whether to transfer a case.¹²² The mere fact that there is calendar congestion and delay in his county and little or none in another county ought not alone to constitute a sufficient basis for ordering transfer, but in connection with other factors it could be considered a significant make-weight.¹²³

(b) *Basic Framework of Chapter 2704*

First, if plaintiff brings suit in a county enumerated in 2704.03,¹²⁴ or in a place designated in another venue statute,¹²⁵ venue will be deemed proper and the case will be presumed to have been brought in a convenient forum. In the vast majority of cases the action will proceed to trial in that county.

It should be noted here that while section 2704.03 expands the number of counties in which venue will be deemed proper and presumed convenient as compared with current law, it does set up

¹¹⁹ See text *supra* p. 132.

¹²⁰ Proposed §§ 2704.03(a)-(d), *supra* p. 147. See Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 311-13 (1951).

¹²¹ Proposed § 2704.03(e), *supra* p. 148. See Stevens, *supra* note 120, at 310.

¹²² Proposed § 2704.07(i), *supra* p. 150.

¹²³ Proposed § 2407.01, last paragraph, *supra* p. 150.

¹²⁴ *Supra* pp. 147-48.

¹²⁵ Proposed § 2704.13, *supra* p. 151.

a system of priorities. For example, a plaintiff in a tort action who wishes to commence suit in the county in which he resides will not get the benefit of the presumption unless defendant does not reside or have his principal place of business within the state, has not conducted activity within the state which gave rise to the cause of action, does not regularly and systematically conduct his business activity within the state and unless the cause of action or part of it did not arise within the state.¹²⁶ In short, as is generally true of most venue statutes, this proposal favors the bringing of suit in counties with which defendant has had meaningful contact or in counties which have a meaningful relation to the cause of action. However, the plaintiff is not necessarily locked in to such counties if in a particular case another county is more convenient.

Second, if the defendant has reason to believe that the county in which the action is brought, although presumed to be a convenient forum under 2704.03, is not a convenient forum, and the defendant moves to transfer, the court is obliged to consider the factors enumerated in Section 2704.07¹²⁷ in order to determine whether the presumption of convenience is overcome and whether the case should therefore be transferred, under section 2704.05,¹²⁸ to a more convenient forum within the state.

Third, if the plaintiff brings suit in a county other than one deemed proper under section 2704.03, then upon defendant's motion the court is obliged under section 2704.04, to transfer to a convenient forum (not necessarily one enumerated in section 2704.03) *unless* the plaintiff establishes that the county in which he brought suit is a more convenient forum when the factors enumerated in section 2704.07 are considered.¹²⁹ That is, the fact that plaintiff has brought suit in a county which is not listed as a proper venue will not result in a dismissal, but the action will either be retained for trial or be transferred to a more convenient forum.

Fourth, whether plaintiff brings his action in a presumptively convenient forum or not it is open to the court, on its own motion or on motion of defendant, to find that the county in which the suit is brought is an inconvenient forum, and that there exists no convenient forum within the state to which the case could be trans-

¹²⁶ Proposed § 2704.03 (i), *supra* p. 148.

¹²⁷ *Supra* pp. 149-50.

¹²⁸ *Supra* pp. 148-49. The U.S. Supreme Court, in *Burnett v. New York Cent. R.R.*, 380 U.S. 414, 131 n.8 (1965) listed thirty-one states which have transfer-of-venue statutes.

¹²⁹ *Supra* p. 148.

ferred.¹³⁰ This might occur, for example, in a situation where a non-resident plaintiff and a nonresident defendant were litigating a wholly out-of-state cause of action in an Ohio county where the defendant happened fortuitously to be found and served with process. Here, the county would be presumed convenient under 2704.03, paragraph j (3).¹³¹ Nevertheless, the court would be likely to find that there is no reason, apart from the fact that plaintiff and defendant are before the court, for litigating the case in the county in which it was brought, or anywhere else within the State.

In this situation two possibilities are presented under section 2704.06. First, the court can stay the action while plaintiff brings suit in a convenient forum in another jurisdiction outside the State. As a condition to ordering the stay the court can extract the defendant's consent to jurisdiction of his person, and his waiver of objections to venue and the statute of limitations in the other State. In effect, this procedure would amount to a transfer to another State, with the troublesome condition in the federal transfer statutes—that the action be transferred to a place “where it might have been brought”¹³²—eliminated. If defendant should fail to consent or should breach his agreement to consent then the court is free to proceed with the action, even though the forum is inconvenient.

The second possibility—highly remote unless the cause of action occurred outside the United States and the parties were aliens—is that there is no other forum more convenient than the one in which the suit has been brought. In this situation the court has discretion either to dismiss or proceed. Ordinarily, the court could be expected to make this decision by balancing the harm to the plaintiff of a dismissal against the harm to the defendant in proceeding in a totally strange forum fortuitously selected and the effect on the administration of justice if an “alien” cause of action is heard in the forum. In most cases justice would probably require the court to hear the action; this would be consistent with current Ohio practice, which does not recognize the doctrine of *forum non conveniens*.¹³³ Nevertheless, the right to dismiss and thereby to prevent

¹³⁰ Proposed § 2704.06, *supra* p. 149.

¹³¹ *Supra* p. 148.

¹³² 28 U.S.C. §§ 1404(a), 1406(a) (1964). Section 1406(a) provides that the transfer shall be to a district or division in which the action *could* have been brought. See I. MOORE & H. FINK, JUDICIAL CODE PAMPHLET 605-10, 619 (1966).

¹³³ *Mattone v. Argentina*, 123 Ohio St. 393, 175 N.E. 603 (1931).

an unwarranted imposition on the court's jurisdiction or serious injustice to defendant ought to be available.¹³⁴

Fifth, if there are multiple plaintiffs, defendants or causes of action venue will be deemed proper if the county of suit is convenient under the terms of section 2704.03 as to any party or as to the place where one of the causes of action arose.¹³⁵ Section 2704.08 is not intended to change the rules permitting or denying joinder of parties or causes of action. The section, somewhat similar in wording to rule 42 (b) of the Federal Rules of Civil Procedure, will permit the court to sever claims or issues and transfer them to a more convenient forum for trial under the same circumstances in which a transfer of any action will be allowed under this chapter. Importantly, this section provides that if venue is based upon a relationship between the activities of one defendant or one plaintiff and the forum, or upon the fact that one of several causes of action arose in the county, and the "key" party is dropped or the "key" cause of action is dismissed, the court will *not* lose jurisdiction over the remaining parties or causes.¹³⁶ Instead, the court can proceed with the case or transfer to a more convenient forum.

Sixth, again, as in the section dealing with personal jurisdiction, the court has power, under section 2704.09,¹³⁷ to award costs to either plaintiff or defendant, including reasonable attorney's fees, to compensate defendant for the inconvenience of being sued in an inconvenient forum and to compensate plaintiff for being forced to defend a frivolous motion to transfer or dismiss. Properly used this section should discourage abuse of plaintiff's privilege of bringing his action in a county other than one enumerated in section 2704.03, and should also prevent the motion to transfer under this chapter from becoming a tool whereby the defendant can harass the plaintiff

¹³⁴ Cf. Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929). The court should not dismiss if there is no other forum in which suit could have been brought.

¹³⁵ Proposed § 2704.08, *supra* p. 150.

¹³⁶ This would overturn the draconian rule of *Bucurenciu v. Rambo*, 117 Ohio St. 546, 195 N.E. 565 (1927), which provides that where two or more defendants residing in different counties are sued in a tort action and the validity of service on D2 (under OHIO REV. CODE ANN. § 2703.04 (Page 1953)) is based upon the action being "rightly brought" in a proper county against D1, the court will lose jurisdiction of the action against D2 if a verdict is returned in favor of D1. See also *Glass v. McCullough Transfer Co.*, 159 Ohio St. 505, 112 N.E.2d 823 (1953); *Dunn v. Hazlett*, 4 Ohio St. 436 (1854). Compare *Maloney v. Callahan*, 127 Ohio St. 387, 188 N.E. 656 (1933).

¹³⁷ *Supra* pp. 150-51.

and delay the litigation.¹³⁸ Thus, the language of section 2704.09 permits the court to award such reasonable costs as are "just." This should be interpreted to allow the court to consider the motives and good faith of the parties in deciding what amount is just. For example, the bringing of suit by plaintiff in an inconvenient forum ought not to be the basis of an award of all of the defendant's attorney's fees attributable to the motion to transfer where plaintiff had no other reasonable alternative or, particularly, where plaintiff's inability to bring suit in a convenient forum was due to defendant's own evasive tactics.

Seventh, another provision designed to prevent harassment and delay is section 2704.12,¹³⁹ which spells out that orders issued under the main provisions of this chapter shall, in effect, be final and not subject to reversal on appeal except in cases of abuse of discretion. In most cases, the questions whether to transfer or whether to award all or part of the costs of transfer will be based on a large number of variables.¹⁴⁰ While the court ought not to transfer a cause out of a presumptively convenient forum, or award heavy costs, unless there is a strong reason to do so,¹⁴¹ it is apparent that in many cases reasonable men might differ as to the proper decision. In such cases reexamination of the decision, if allowed, would encourage delay and harassment. However, the danger of abuse of these powers is present and, for the protection of the parties, it is necessary to retain the right to appeal on the ground of abuse of discretion.

(c.) *Special Problems and Applications*

Section 2704.03, which creates a presumption of convenience if suit is brought in an enumerated county, is consistent with some common-sense views of which geographical areas will normally prove convenient for the trial of a law suit. It may be assumed that defendant will ordinarily have little to complain about if suit is commenced in a county in which he resides or in which he habitually conducts activity. It is intended, therefore, that these counties will be presumed to be convenient in any lawsuit, even in those actions which in the past were confined to other counties. Similarly, the county in which defendant conducted activity giving rise to the

¹³⁸ Cf. FOSTER, REVISION NOTES TO WIS. STAT. ANN. Title XXV § 262.20, at 65.

¹³⁹ *Supra* p. 151.

¹⁴⁰ See Proposed § 2704.07, *supra* pp. 149-50, and cf. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

¹⁴¹ See FOSTER, REVISION NOTES TO WIS. STAT. ANN., TITLE XXV, §§ 262.19-20 at 61-66.

cause of action might ordinarily be deemed a convenient forum, although more instances can be imagined where trial in such a county might prove inconvenient. It is intended that the language "conducted activity which gave rise to the cause of action" and "in which . . . a part of the cause of action arose" should be liberally interpreted to include any activity closely associated with the cause of action even though it might technically be argued that the cause of action did not arise in that county.¹⁴² For example, defendant in an action for personal injuries might be sued in a county where he negligently repaired plaintiff's automobile although the injury resulting from such negligent repair actually occurred in another county. Or defendant might be sued in a county where he wrote a libelous letter although the libelous words were published in another county. Since this section only creates a rebuttable presumption of convenience, narrow or niggardly interpretation of its language would serve no useful purpose.

Another alternative, contained in paragraph (e),¹⁴³ is the county where all or part of the property is located in an action in which real or tangible personal property is the subject of the action. It should be emphasized that this county is not exclusive, since other counties may also be deemed convenient under this section. Thus, actions for trespass, ejectment, specific performance, mortgage foreclosure, to remove cloud on title and partition may be brought in other counties, although it is expected that many such suits will continue to be brought in the county where the land is located.¹⁴⁴ However, there does not seem to be any special reason why the trial of any of these actions, as opposed to execution of judgment, must be brought in the county in which the property is located rather than some other convenient county. If the action is brought in a different county, and if a judgment or decree is rendered, then

¹⁴² Compare the recommendations of Professor Stevens in Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 333-34 (1951).

¹⁴³ *Supra* p. 148.

¹⁴⁴ Frequently, the court of the county in which the res is located will be in the best position to deal with the problems raised by the action. Stevens, *supra* note 142 at 310. In particular cases, however, other counties may prove to be more convenient. E.g., an action for specific performance where no view of the premises is required and the witnesses to the contract and its alleged breach are located elsewhere.

In any event, the troublesome common law distinction between personal actions that are local and those that are transitory was not adopted in Ohio. Personal actions are local only if made so by statute. *Fostoria v. Fox*, 60 Ohio St. 340, 54 N.E. 370 (1899); *Genin v. Grier*, 10 Ohio St. 209 (1840). See, e.g., *Gustafson v. Buckley*, 161 Ohio St. 160, 118 N.E.2d 403 (1954).

such judgment or decree is required by section 2704.11 to be filed and recorded in the county where the property is located.¹⁴⁵

Similarly, trial of an action against a public officer will also be deemed convenient in any one of the enumerated counties.¹⁴⁶ Such an action will be permitted in, but will not be limited to, the county where the officer performs his duties or holds office. The same approach is taken with respect to actions against legal representatives, who can be sued in any one of the enumerated counties as well as in the county in which the appointment was made.¹⁴⁷

Another alternative open to plaintiff is to bring suit in a county where all or part of the cause of action arose.¹⁴⁸ Ordinarily, such county will be the place where witnesses to liability will be present and where a view of the premises will be available.

In actions for divorce, annulment or alimony the existing place of venue is retained¹⁴⁹ but it too is to coexist with other enumerated alternatives. There seems to be no good reason why such suits should not be brought in counties where defendant has close relationships, providing of course that other substantive requirements, such as residence or domicile, are fulfilled.¹⁵⁰ A statute dealing with the establishment of a convenient forum is hardly the place to include such substantive requirements. It is to be expected, of course, that such suits will ordinarily be brought in the county of plaintiff's residence.

The remaining paragraphs of this provision—(i) through (j)¹⁵¹—differ from the prior paragraphs in that the counties in (i) through (j) will not be presumed to be convenient unless no county enumerated in (a) through (h) is available. Furthermore, the counties in paragraph (j) will not be entitled to the presumption unless the counties in (a) through (i) are not available. The reason for the difference is simply that the law has generally favored suit in places

¹⁴⁵ *Supra* p. 151.

¹⁴⁶ Proposed § 2704.03 (d), *supra* pp. 147-48.

¹⁴⁷ Proposed § 2704.03 (g), *supra* p. 148.

¹⁴⁸ Proposed § 2704.03 (f), *supra* p. 148.

¹⁴⁹ Proposed § 2704.03, subsections (f), (h), *supra* p. 148. The equivalent provision in the current law is contained in OHIO REV. CODE ANN. § 3105.03 (Page Supp. 1966).

¹⁵⁰ For example, the current code section which contains venue requirements for divorce actions also requires that "plaintiff in actions for divorce and annulment shall have been a resident of the state at least one year immediately before filing the petition." OHIO REV. CODE ANN. § 3105.03 (Page Supp. 1966). This provision has nothing to do with venue. It will not be changed by the proposed statute.

¹⁵¹ *Supra* p. 148.

where the defendant resides or has a close connection, where the cause of action arose or where the subject of the action is located.¹⁵² To allow suit in a county in which plaintiff resides or has a close connection is more likely to give the plaintiff an undue advantage and to undermine the protection which the law has usually granted to defendants.¹⁵³ To allow suit in a county where defendant happens to have property unrelated to the action, where he has appointed an agent to receive service of process, or where he has been summoned, is to allow the action to proceed in a place which may be totally unrelated to the cause of action and the parties, and which may therefore be a most inconvenient, if not an irrational place in which to prosecute the suit.¹⁵⁴ Thus, the scheme of this proposal is to deny these counties the benefit of the presumption unless no other county is available. Only then will they be presumed to be convenient because of the absence of convenient alternative forums.

Section 2704.04¹⁵⁵ allows the court to transfer the action to a presumptively convenient forum in a case where plaintiff brings suit in a county to which the presumption of convenience under section 2704.03 is not available if defendant moves for transfer or if the court, on its own motion, decides to exercise its discretion to transfer. In any case, plaintiff is permitted to argue that the forum is a convenient and proper place of suit. The suit should be retained there if he succeeds in convincing the court, based on the factors set forth in section 2704.07,¹⁵⁶ that the forum is a *more* convenient place for trial than any other county listed in section 2704.03. If it is not more convenient then it should be transferred to an enumerated county in order to give defendant whatever advantage accrues to having the suit brought in a more traditional forum.

If it should turn out that the non-enumerated county in which suit is brought is more convenient than any county as to which the presumption of convenience would have applied, but less convenient than another non-enumerated county, the court is still free

¹⁵² See Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 310-12 (1951). Cf. *Hayslip v. Conrad Produce, Inc.*, 10 Ohio Misc. 155, 226 N.E.2d 839, 843-44 (C.P. 1967).

¹⁵³ Sunderland, *The Provisions Relating to Trial Practice In the New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 188, 192 (1933).

¹⁵⁴ See Stevens, *supra* note 152 at 313-14.

¹⁵⁵ *Supra* p. 148.

¹⁵⁶ *Supra* pp. 149-50.

under section 2704.05¹⁵⁷ to transfer to the more convenient non-enumerated county.

Section 2704.05¹⁵⁸ combines the current Ohio statute, permitting transfer where a fair trial cannot be had in the county in which suit is brought, with a general transfer provision similar in purpose to the federal transfer statute, but there are major differences between paragraph (b) and section 1404(a) of the federal code. First, the much criticized federal requirement that the suit be transferred only to a place where it might have been brought in the first place—that is, where jurisdiction, proper venue and service could have been achieved by plaintiff without the court's assistance—has been eliminated.¹⁵⁹ Since transfer under this provision is to another forum within the State, and since venue is now made a matter of convenience, there is no reason why it is necessary to limit the transferee forum to a place where the action "might have been brought."¹⁶⁰ Second, the criterion for transfer is changed slightly to point up that calendar congestion and delay¹⁶¹ and possibilities of prejudice resulting from inconvenience are factors which may be considered in determining whether to transfer to another forum. The language of paragraph (b) is deliberately made general—even ambiguous—to allow for a broad and generous interpretation based on factors like those listed in section 2704.07. It should be emphasized, however, that it is not the purpose of this section to allow the shifting of cases around the state *merely* to solve the calendar congestion problem of particular counties; the convenience of parties and witnesses to the action should always be a more important consideration.

Section 2704.06¹⁶² is the counterpart of section 2702.05¹⁶³ in the chapter dealing with jurisdiction. Here, however, we can assume that the court has acquired personal jurisdiction over the parties. Nonetheless, the court may find that there is no convenient forum within the State. This situation can continue to occur so long

¹⁵⁷ *Supra* pp. 148-49.

¹⁵⁸ *Id.*

¹⁵⁹ See J. MOORE & H. FINK, JUDICIAL CODE PAMPHLET 600-610 (1966).

¹⁶⁰ Furthermore, under the approach suggested here it is arguable that an action might have been brought in any county, since failure of venue is no longer ground for dismissal.

¹⁶¹ This factor as a consideration relevant to dismissal under the common law doctrine of forum non conveniens is mentioned in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Mooney v. Denver & R.G.W. R.R.*, 221 P.2d 628-29 (Utah 1950).

¹⁶² *Supra* p. 149.

¹⁶³ *Supra* pp. 143-44.

as the courts continue to recognize mere presence coupled with service of process within the State—"transient jurisdiction"—as a basis of acquiring in personam jurisdiction.¹⁶⁴ A major purpose of this section is to deal with such situations by providing the defendant with an opportunity to have the case tried in a more convenient jurisdiction outside the State—one which has some meaningful relationship to the cause of action or to himself—by affecting a transfer.¹⁶⁵ The conditions imposed are simply to assure the plaintiff that defendant will not take advantage of this opportunity by moving to have the case dismissed for reasons not on the merits when it is recommenced in the convenient forum.

Section 2704.07¹⁶⁶ is a key section. It lists a series of factors of a kind which the trial judge may examine in order to determine whether a particular place would be a "convenient forum" for purposes of transfer or retention. Most of them are similar to those mentioned by the United States Supreme Court in the case of *Gulf Oil Co. v. Gilbert*,¹⁶⁷ treating of the common law doctrine of forum non conveniens. The section makes clear that the list is not intended to be exhaustive. There are other similar factors which cannot all be foreseen but which might also be considered in determining whether or not a particular county is a convenient place for trial. Furthermore, no attempt is made to assign weights to the enumerated factors. It is up to the judge in each case to make a determination based upon a sound discretion. The only limitation imposed is that in overcoming the presumption of convenience set forth in 2704.03, the balance of convenience must "preponderate heavily" against the presumptively convenient county and in favor of another forum.¹⁶⁸ Lastly, there is no attempt to clarify the meaning of each of the listed factors beyond what is already obvious in their statement. In different contexts the various factors are quite likely to be given different interpretations as well as different weights. In essence, therefore, they stand as a suggestive checklist.

¹⁶⁴ Transient jurisdiction is provided for in the proposals in this paper. Proposed § 2702.02(4), *supra* p. 140. But see Ehrenzweig.

¹⁶⁵ Compare WIS. STAT. ANN., § 262.19 (Supp. 1967).

¹⁶⁶ *Supra* pp. 149-50.

¹⁶⁷ 330 U.S. 501 (1947). See also the interesting discussion of the relevant factors in *Mooney v. Denver & R.G.W. R.R.*, 221 P.2d 628 (Utah 1950).

¹⁶⁸ It is suggested that the burden of establishing a case either for intra- or interstate transfer under these proposed statutes ought to be less than that applicable to a dismissal under the common law doctrine of *forum non conveniens*. Cf. *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955) and *J. MOORE & H. FINK, JUDICIAL CODE PAMPHLET 604* (1966).

An important feature built in to this chapter is the right of the trial judge to effect transfer on his own motion as well as on the motion of defendant. Ordinarily, in a case where convenience is mainly a matter of concern to the parties themselves—touching the effective administration of justice only tangentially—the court ought not to effect transfer if defendant does not himself request it. There are situations, however, where important factors relating to the effective administration of justice are also present (they may be the same factors) in great degree, as where there is substantial calendar congestion and where the suit has little or no relationship to the forum, but where defendant does not choose to move for transfer. In these instances the judge ought to transfer the case on his own initiative. Of course, he should never use the transfer power merely to rid himself of a difficult or unpopular cause; to do so would constitute an abuse of discretion. Occasionally, plaintiff will discover after suit is commenced that the forum is inconvenient. This discovery may occur during or after pre-trial discovery, during or after the pre-trial conference, or during trial. Under the philosophy of this chapter there is no good reason why plaintiff himself should not be able to move for transfer.¹⁶⁹ Of course, since plaintiff had the right to select the forum in the first place, the court should not effect the transfer in such a case unless the reasons in support thereof are substantial. The court should also be wary of a plaintiff who starts a case in an inconvenient forum and then requests transfer with harassment or delay as a motive.

Trial attorneys will recognize the possibility, suggested above, that some judges will transfer a case for base motives. If the transferee judge feels that the transfer was improper, he may be tempted to retransfer the case to the original court. This, of course, might engender a game of ping-pong between two judges, leaving the plaintiff's cause as the hapless ball bouncing back and forth between the two courts. In order to avoid this possibility section 2704.10¹⁷⁰ prohibits a re-transfer unless the transferee judge finds that the transferor judge abused his discretion in ordering the transfer in the first place. Even if such a finding is made, the case cannot be re-transferred for trial to the judge who ordered the original transfer if another judge is available in the same county. Hopefully, the good faith and good sense of most Ohio judges, coupled perhaps

¹⁶⁹ Cf. 1 J. MOORE, *FEDERAL PRACTICE* ¶ 0.145[6.-2] at 1791 (2d ed. 1964). Korbel, *Plaintiff's Right to Change of Venue in Federal Courts*, 38 U. DET. L.J. 137 (1960).

¹⁷⁰ *Supra* p. 151.

with the odium likely to attach both to a judge who has unfairly determined that a brother judge has abused his discretion or to the judge who in fact has abused his discretion, will bar such misuse of this chapter except in the rarest instances. Obviously, the power to transfer, like any of the numerous powers left to the discretion of a judge, is based on the necessary assumption that judges will act in good faith to effectuate the policies underlying the grant of the power.

3. Process

A major revision of OHIO REVISED CODE chapter 2703, Service of Summons, is not necessary in order to accomplish the objectives set forth at the beginning of this paper. Instead, revision of a few existing sections will be proposed.

2703.03 Requisites of Summons.

(1) The summons *shall* be issued and signed by the clerk, and be under the seal of the court from which it is issued. Its style shall be: "The State of Ohio . . . county." and it *shall* be dated the day it is issued. It shall be directed to the *defendant or defendants and contain the name of the party or parties suing and the name and address of the plaintiff's attorney, or if plaintiff has no attorney, the plaintiff's address.* It shall inform the party that he has been sued, describe the nature of the relief sought, inform the party of the time within which the law requires him to answer or take such other action as may be permitted by law, and notify him that in case of his failure to do so judgment will be rendered against him for the relief demanded in the petition.

(2) *No action shall be dismissed, and no summons shall be quashed for defects, irregularities or omissions in the summons, the mode of service, or the return of service, unless it clearly appears that material prejudice to the substantial rights of the party against whom the process issued would result. Where such defects, irregularities, or omissions do not result in such prejudice, the court may allow any summons or return of service to be amended at any time and upon such terms as it deems just.*¹⁷¹

(3) If the defendant fails to appear, judgment shall not be rendered for a larger amount than the amount demanded in the petition, with interest, if any, and the costs.

The word *shall* has been inserted to replace the word *must* in paragraph (1). The purpose is to make the language of this section consistent with an approach in which defects in process or service will not result in dismissal of suit or quashing of service unless the defect prejudices the substantial rights of the party served.

¹⁷¹ Adapted from MICH. GEN. CT. R. 102.3 (1963).

The addressee of a summons under this proposal would be the defendant rather than the sheriff. Since the main purpose of service is notice, and since the role of the sheriff in the ordinary case is not to arrest the defendant, but merely to give him notice, the summons need not conform to the older requirements of a common law writ.¹⁷² Furthermore, a subsequent section will permit service by private persons without the consent of a sheriff.¹⁷³ Unless a different form of summons were to be required in such cases, addressing such summonses to a sheriff would be meaningless.

This section also eliminates the present requirement that the summons contain the amount sued for, although the nature of the relief sought is still included. Since a copy of the petition will be required to be served with the summons,¹⁷⁴ the details of the cause of action, including amounts, will be made available to the party served.

Paragraph (2) is central to the proposed changes. It is designed to insure that defects or irregularities in the summons, the mode of service or the return will not affect the validity of the action unless the defendant would suffer injury to his substantial rights. Essentially, the defendant is entitled only to notice of the action and a reasonable opportunity to defend. So long as this constitutional minimum is realized plaintiff should be allowed to correct the defect or irregularity by amendment before or after judgment. But even if the plaintiff does not amend, the validity of the action or a judgment rendered therein should not be subject to direct or collateral attack simply by reason of an inconsequential defect or omission.¹⁷⁵

Paragraph (3) of this section is similar to the last sentence of present section 2703.03. The only change made is to reflect the fact that notice of the amount of damages sought will be found in the ad damnum of the petition rather than in the summons.

¹⁷² See discussion, pp. 119-20 *infra*.

¹⁷³ Proposed § 2703.07, *infra* p. 166.

¹⁷⁴ Proposed § 2703.08, *infra* p. 166.

¹⁷⁵ This would eliminate the distinction between "mandatory" requirements of process and requirements which, if not fulfilled, are deemed mere irregularities. Henceforth, all such requirements will be correctible and should not affect jurisdiction if the summons is calculated to give defendant notice and a reasonable opportunity to defend. *Contra*, *Baldine v. Klee*, 39 Ohio Op.2d 295, 304-06, 224 N.E.2d 544, 548-50 (C. P. 1965). *But see* *Shilling v. Octavio*, 176 Ohio St. 123, 198 N.E.2d 52 (1964). Compare the proposed section with OHIO REV. CODE ANN. § 2903.58 (1953).

2703.04 Summons may be issued outside the county in which the action is brought.

There is no territorial limitation on the range of service of a summons issued by a court of this State under the provisions of this chapter; provided, however, that where the sole basis of jurisdiction of a defendant is his physical presence within this State, defendant must be personally served in the county within this State in which he is found.¹⁷⁶

Current section 2703.04¹⁷⁷ has been a source of great and unfounded confusion. In effect it makes validity of service of process in a county other than the one in which the action was brought depend upon the propriety of venue in the place where the action was brought.¹⁷⁸ There is no reason, however, why there should be any territorial limits on the place where a summons may be served. The purpose of summons is notice.¹⁷⁹ If a valid basis of jurisdiction exists and if venue is proper—and these are matters best handled by separate provisions of the code—then adequate notice may be given anywhere, within or without the State. The only possible exception is the case of jurisdiction based solely on defendant's presence within the State, where personal service within the State serves to bring defendant within the jurisdiction of the court as well as to give him notice. This exception is provided for in the proposal.

If defendant desires to object to venue, jurisdiction or the validity of service he is not precluded from doing so under this proposal. The major change is that, except for the noted exception, being served outside the county in which suit is commenced will not provide an independent basis for quashing service or dismissing the action.

The second part of the current section, providing in effect for venue of an action against the maker, acceptor or drawer of an instrument, is entirely eliminated. It has no place in the chapter dealing with service of summons, and is adequately dealt with by

¹⁷⁶ Adapted from MICH. GEN. CT. R. 105.9 (1963). Cf. OHIO REV. CODE ANN. § 2325.03 (1953), which allows a judgment to be reopened up to five years after it has been rendered if service was made by publication and if defendant can show, to the court's satisfaction, that he had no actual notice of the action.

¹⁷⁷ OHIO REV. CODE ANN. § 2703.04 (Page 1953) reads in part:

When the action is rightly brought in any county, according to sections 2307.32 to 2307.40, inclusive, of the Revised Code, a summons may be issued to any other county against one or more of the defendants at the plaintiff's request

¹⁷⁸ See notes 116 and 136 *supra*.

¹⁷⁹ See text *supra* pp. 120-21, 127-29.

general provisions in the venue chapter.¹⁸⁰ There is no intention in deleting the second paragraph either to make any substantive changes in the rights of persons holding cognovit notes, or to make it easier to sue on a note in an inconvenient county.

2703.07 Service of Summons.

The summons shall be served by any person of suitable age and discretion who is not a party nor an officer or employee of a corporate party.¹⁸¹ When it is served by a person other than a sheriff, or when the service is made out of this State, the return must be verified by oath.

Again, since the primary contemporary purpose of service is to bring notice of suit home to defendant, it is not necessary that service be made by an officer or his designate. This change allows service to be made by "any person of suitable age and discretion¹⁸² who is not a party nor an officer or employee of a corporate party." This limitation plus the requirement that such person, if not a sheriff, verify the return by oath should minimize the danger of fraud. There is nothing unique about a provision of this kind in modern American jurisprudence.¹⁸³

2703.08 Manner of Service and return.

Service shall be made at any time before the return day,

(1) by delivering a copy of the summons, with the indorsements thereon, *and a copy of the petition*, to the defendant personally; (2) by leaving *copies* at his usual place of residence; (3) if the defendant is a partnership sued in its company name, by leaving a copy of the summons and the petition at its usual place of doing business, or with any member of such partnership or (4) *in any other manner permitted in the Revised Code*. The return *shall* be made at the time mentioned in the *summons*, and the time and manner of service shall be stated on the *summons*. *Failure to make proof of service does not affect the validity of the service.*

The major change in this section is to require a copy of the petition to be served with the summons. Since a copy of the peti-

¹⁸⁰ Proposed § 2704.03, *supra* pp. 147-48.

¹⁸¹ Adapted from MICH. GEN. CT. R. 103(1) (1963).

¹⁸² This should be construed liberally to permit service by anyone old enough and intelligent enough to comprehend the nature and importance of his task. Due regard to problems of "sewer service" might require some additional safeguards to be written into Chap. 2703. See Note, *Abuse of Process: Sewer Service*, 3 COLUM. J. OF LAW & SOC. PROBS. 17 (1967).

¹⁸³ See, e.g., *Bush v. Meacham*, 53 Mich. 574, 19 N.W. 192 (1884). According to the Joint Committee on Michigan Procedural Revision, California, Iowa, Illinois, Minnesota, New York, Oregon and Wisconsin have comparable provisions. See JOINT COMM. ON MICH. PROCEDURAL REVISION, FINAL REP. Pt. III, at 9 (1960).

tion must be filed with the clerk in order to commence the suit,¹⁸⁴ the requirement that a copy be served on defendant should work no hardship on plaintiff. On the other hand, it should guarantee the defendant fuller and more effective notice than he is entitled to under current practice. This requirement is similar to that required in other jurisdictions¹⁸⁵ and, by local rules, in Ohio.

The other changes in this section are minor. The word *must* is changed to *shall* in order to emphasize that a failure to make a return within the time mentioned in the summons or to state the manner of service in the summons will not result in a mandatory dismissal. This objective is also supported by the addition of the sentence which provides: "Failure to make proof of service does not affect the validity of the service," and by the provisions of proposed section 2703.03 (2), *supra*.

Subparagraph (4) takes account of the fact that the OHIO REV. CODE contains provisions for service of process in specific actions or in specific courts which may differ from the methods set forth herein. It is not the intention here to repeal all such provisions. For the most part the specific provisions will tend to be more restrictive than those set forth here. So long as the specific provisions are constitutional, however, there is no reason why they should not co-exist with the provisions of this chapter or why an attorney may not use either method unless the specific provision is expressly made exclusive.

2703.12 Service upon a non-resident.¹⁸⁶

(1) When the defendant is a foreign corporation, foreign partnership or other foreign association having a managing agent in this State, the service may be upon such agent;

(2) When the defendant is a foreign corporation, foreign partnership or other foreign association, whether or not it has a managing agent in this State, service may be upon the president, vice-president, secretary, treasurer or other principal officer of such corporation, partnership or association by sending true and attested copies of the summons and petition to such officer by registered or certified mail, postage prepaid, addressed to the last known principal office of such corporation, partnership or association. The registered or certified mail return receipt shall be attached to and made a part of the return of service.

¹⁸⁴ OHIO REV. CODE ANN. § 2703.01 (Page 1953).

¹⁸⁵ See FED. R. CIV. P. 4(d); MICH. GEN. CT. R. 105.1 (1963).

¹⁸⁶ This section should render OHIO REV. CODE § 2307.383 (Page 1953), relating to service of process on nonresidents in actions brought under the "long-arm" statute, unnecessary.

(3) Where the defendant is a nonresident natural person, service may be made upon him by sending true and attested copies of the summons and petition to such person by registered or certified mail, postage prepaid, addressed to his last and usual place of abode. The registered or certified mail return receipt shall be attached to and made a part of the return of service.

The purpose of the major changes to this section in subparagraphs (2) and (3) are to permit service upon nonresident individuals, corporations, partnerships and other associations by registered or certified mail. Obviously service outside the State in this manner will not confer jurisdiction over a non-resident who is not amenable to jurisdiction. But if the defendant is otherwise amenable to the court's jurisdiction—as where he has sufficient minimum contacts with the State—then service by registered or certified mail is as likely to give him the notice which is his due as any other method.¹⁸⁷ There is no good reason for retaining the current dual requirement that where the cause of action accrued within the State—an irrelevant consideration for the purposes of this section—the summons must be served on an officer or employee and *also* sent to the principal office of the corporation.¹⁸⁸

This proposed change should obviate the use of notice by publication where a nonresident defendant's residence or principal office, if not a natural person, is known. It should be noted that under present law, notice of suit by mail is required even in case of notice by publication where the residence of the defendant is known.¹⁸⁹

2703.20 Service upon executor or administrator of operator or owner of motor vehicle; service upon infant operators and owners.

In any civil suit or proceeding in the courts of this State, based upon the operation or ownership of a motor vehicle, arising out of, or by reason of, any accident or collision in which such motor vehicle is involved, where the operator or owner dies prior to the commencement of the action, service of process may be made on the executor or administrator of such operator or owner in the same manner and on the same notice as is provided in the case of an operator or owner. Where an action has been commenced by service on an owner or operator who dies thereafter, the court must allow the action to be continued against

¹⁸⁷ See Comment, *Personal Service of Process—An Outdated Concept*, 28 U. PITT. L. REV. 319 (1966).

¹⁸⁸ OHIO REV. CODE ANN. § 2703.12 (Page 1953).

¹⁸⁹ See OHIO REV. CODE ANN. § 2703.16 (Page 1953). Cf. OHIO REV. CODE ANN. § 2703.19 (Page 1953) which now permits personal service outside of the state if service may be made by publication.

his executor or administrator upon motion with such notice as the court deems proper. Where the operator or owner of such motor vehicle is an infant, service shall be made upon the infant only, and service upon the persons named in section 2703.13 of the Revised Code shall not be required.

The main provisions of this section in its current form should be repealed. Service upon nonresident operators or owners of motor vehicles or resident operators or owners who become non-residents or conceal their presence, in cases where the action arises out of an automobile accident or collision within the State, is amply provided for by other sections.¹⁹⁰ There is no longer any reason for a separate provision for service in auto cases, just as there is no reason for a separate provision for personal jurisdiction in such cases. The approach in the current law—that the defendant appoints the Secretary of State agent for service of process and that summons must first be served on the Secretary of State—is anomalous. The fictional theory of “implied consent” to service which formerly required the fictional appointment of an agent is no longer part of the jurisprudence of due process.¹⁹¹ By repealing this section we lose no benefits, but the Secretary of State is taken out of the useless business of accepting and forwarding service of process.

However, the section of present section 2703.20 which provides for service upon the executors or administrators of a deceased owner or operator and for service upon an infant owner or operator is retained and broadened to include residents as well as nonresidents. While it can be argued that jurisdiction and service upon executors and administrators are already provided for by the broad definition of “persons” in the proposed jurisdiction section¹⁹² and the survival statute¹⁹³, so that these provisions are unnecessary (except as to the part dealing with service upon infants), it will do no harm to keep such provisions in the “service” chapter and may serve purposes of clarification. If such provisions are to be retained, however, they should not necessarily apply only to nonresident executors and administrators, but should be equally applicable to residents. Similarly,

¹⁹⁰ See proposed §§ 2703.08, 2703.12, 2703.23 and OHIO REV. CODE ANN. §§ 2703.10, 2703.14 (Page 1953).

¹⁹¹ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁹² Proposed § 2702.01, *supra* p. 139.

¹⁹³ OHIO REV. CODE ANN. § 2305.21 (Page 1953) See also OHIO REV. CODE ANN. §§ 2311.21 (revivor of actions), 2125.01 (wrongful death).

there is no need to limit their application to accidents or collisions occurring within this State.

2103.21 Service upon executor or administrator of owners and other operators of aircraft; service upon infant owners and operators.

In any civil suit or proceeding in the courts of this State, based upon the operation or ownership of an aircraft, and arising out of, or by reason of any damage, accident or injury in which such aircraft is involved, where the pilot, operator, legal or equitable owner, lessor, or lessee dies prior to the commencement of the action, service of process may be made on the executor or administrator of such pilot, operator, legal or equitable owner, lessor, or lessee in the same manner and on the same notice as is provided in the case of an operator or owner. Where an action has been commenced by service upon a defendant who dies thereafter, the court must allow the action to be continued against his executor or administrator upon motion with such notice as the court deems proper. Where the pilot, operator, legal or equitable owner, lessor, or lessee of such aircraft is an infant, service in the manner provided in this section shall be made upon the infant only and service upon the persons named in section 2701.13 of the Revised Code is not required.

The proposed amendments to this section are the same as proposed for section 2703.20, *supra*, and for the same reasons.

2703.21 Fee for service of process.

[Repeal is recommended.]

This section provided for a fee to the Secretary of State for receiving service and forwarding notice to defendant under current section 2703.20 and 2703.201. The proposed revisions, above, would eliminate such service, thus making this section unnecessary.¹⁰⁴ Repeal of this section would allow current section 2703.201 to be renumbered consecutively—section 2703.21.

2703.22 Extension to be granted; Interpretation of process provisions.

In any action the court may order such continuance or extension of time as is necessary to afford the defendant reasonable opportunity to appear and defend the action.

The provisions relating to process in this and other chapters in the Revised Code shall be so construed as to uphold the validity of service if notice to defendant was calculated to afford a reasonable opportunity to appear and defend the action and if any defects in the process, service or return do not otherwise affect the substantial rights of any party.

¹⁰⁴ See also note 186 *supra*.

There is no reason why the current rule, section 2703.22, should permit continuances only in situations in which a nonresident defendant is involved in a motor vehicle or aircraft accident. Under the long-arm statute there are many other situations in which a nonresident defendant might be served and require additional time to prepare an answer and defense. Furthermore, there are situations in which a resident defendant might require additional time. The proposed revision would give the court discretion *in any case* to grant a continuance or extension if it finds such is *necessary* to provide defendant with a reasonable opportunity to appear and defend.¹⁹⁵

The second paragraph of the proposed revision emphasizes again that process merely serves to comply with due process requirements of notice calculated to provide defendant a reasonable opportunity to defend the case. The failure of courts in the past to notice general statutory admonitions favoring a liberal nontechnical construction of procedural rules suggests that repetition of this rule of construction at strategic places throughout procedural chapters, such as this one, might serve a useful purpose.

2703.23 Service of writs and process by mail.

In addition to the methods of service and return of writs provided by law, the judge of the court of common pleas and probate judge in each of the counties of the state or the judge of any municipal court, by rule or *upon motion in any case*, may provide for service of writs or process by registered or certified mail, and for the service of persons summoned for jury duty by registered or certified mail.

(1) When provisions for service by mail, registered or certified, are made pursuant to *this section*, a return of the sheriff, or other officer or person *permitted by law* to serve said writ or process, that a true copy of the writ or process *and the petition* was deposited in the mail, registered or certified, shall be proof of residence service at the address on the envelope containing such writ or process *and the petition*; provided that such residence is the correct residence address of the party to be served, that such envelope is not returned to the postal authorities as undelivered, *and that, in a case where the mailing is executed by a person other than a sheriff or bailiff, the return is made under oath.*

(2) In the case of a corporation, domestic or foreign, or a partnership, or an insurance company, a return of the sheriff

¹⁹⁵ The addition of the words "or extension of time" is designed to make clear that more time may be granted to answer. Traditionally, continuance has been defined as the adjournment or postponement of the trial of an action.

or other officer or person *permitted by law* to serve said writ or process that a true copy of the writ or process *and the petition* was deposited in the mail, enclosed in an envelope, registered or certified, addressed to the corporation, partnership, or insurance company at its *principal* office or place where it regularly receives mail, shall be proof of service; provided that such address is a *principal* office of the corporation, partnership, or insurance company, or the place where the corporation, partnership, or insurance company regularly receives mail, that such envelope is not returned by the postal authorities undelivered, and that *in a case where the mailing is executed by a person other than sheriff or bailiff, the return is made under oath.*

(3) *The court in which any action is commenced may, in its discretion, allow service to be made upon defendant in any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard, if an order permitting such service is entered before service of process is made upon good cause shown.*

(4) In any case a *claimant* requesting service by sheriff or bailiff shall be entitled thereto.

The changes in this section are designed to allow a court, even without the passage of a court rule (as required in section 2703.23 as now written), to allow service by mail in a particular case upon motion of the plaintiff.¹⁹⁸ There is no sharp cleavage with the past in this proposal since it has for some time been possible to serve by mail in the case of nonresident motorists and even in the case of nonresident corporations. Furthermore, there is no reason why a court cannot do in a particular case what the courts may now do by court rule.

A second change is to require a copy of the petition to be included with the writ or summons. This will conform this section to other proposals made earlier. It should impose no hardship on plaintiff.

Third, the section is changed to reflect the recommendation that private persons as well as officers be allowed as a matter of course to serve process. When they do, however, they should be required to swear to the correctness of their return.

Fourth, in regard to service by mail on a corporation, the address used should be a *principal* office of the corporation, rather than merely "its office," in order to enhance the likelihood that the notice will be brought home to the officials charged with the

¹⁹⁸ The requirement of registered or certified mail rather than ordinary mail should obviate the possibility of a fraudulent return; it is not likely to impose any hardship upon plaintiff.

duty to defend.

Fifth, the provision currently in section 2703.23 that: "In any case a person requesting service by sheriff or bailiff shall be entitled thereto," has been changed to make it clear that only a claimant can make such request, and not a defendant. If the defendant doubts the authenticity of the summons and petition he is in a position to check with the clerk of court to determine whether a praecipe has been issued and a petition filed. Such checking would not constitute a general appearance.¹⁹⁷

A comparison between the requirements of section 2703.12 and this section is also worth noting. That section provides for mail service upon nonresidents without a prior motion or court rule. The names and addresses for such service are specified in more detail than in proposed section 2703.22. And, unlike section 2703.22, section 2703.12 applies *only* to service on non-residents. It seems clear that a complete revision of this chapter would require a consolidation of section 2703.12 and section 2703.22 into one section dealing with service by mail. For the purpose of this paper, however, the two sections can coexist without causing inordinate confusion.

Finally, subparagraph (3) is a general, catch-all provision which is designed to give the court discretion to permit other nonspecified methods of service in cases where the regularly available means of service prove inadequate.¹⁹⁸ There will probably be few situations in which service by publication or service by mail will not be adequate or convenient from plaintiff's point of view. But the wide variety of situations which can arise and the rapid development of new media of communication suggest that the courts should be given the power to permit a novel method of service in a particular case if plaintiff can establish a good reason why such method should be used. Thus, for example, the court might permit service by telegram if the nature of the plaintiff's claim required haste. The court might also substitute in such a case a brief statement of the nature of the claim for the general requirement that defendant receive a copy of the petition with the summons, since sending a copy of the petition by wire might be inordinately expensive.

The requirement of "good cause shown" is deliberately left vague in order to provide flexibility and to leave broad discretion in the judge; it ought not to be given a niggardly interpretation.

¹⁹⁷ Cf. *Litsinger Sign Co. v. American Sign Co.*, 11 Ohio St.2d 1, 227 N.E.2d 609, 621-22 (1967).

¹⁹⁸ Adapted from MICH. GEN. CT. R. 105.8 (1963).

III. CONCLUSION

Inevitably anyone attempting to revise a body of law has to confront some choices between rigid rules which promote certainty overall but create hardship in some individual cases, and flexible rules which promote justice in all cases but create uncertainty in some. If the body of law being revised is substantive in nature, and if the ability of citizens to conform their conduct to it depends upon their awareness and understanding of it, then certainty and predictability become dominant considerations; one will avoid unpleasant entanglements even with a harsh or unfair rule if he is aware of the consequences of violating it. Rules of practice and procedure, however, are rules of conduct for lawyers and judges involved in the adversary system. Ordinary citizens do not and ordinarily cannot take such rules into account in planning their activities. When procedural rules are complicated or arbitrary in their operation, or when they are not capable of being understood and simply applied by lawyers, the fact that they are certain may create serious injustice for litigants who have no real opportunity to protect themselves against their operation. Furthermore, where the rules, as certain as they may be, no longer serve any useful purpose—when the reasons which gave them life have expired—the injustice they may cause when rigidly applied to a litigant's case is absolutely intolerable. Unfortunately, such injustice has not been absent from the application of the Ohio procedural rules which are dealt with in this paper.

In general, the proposals made here are designed to eliminate rules which serve no contemporary purpose and, as to other rules, to favor flexibility over rigidity and arbitrariness. Thus, this article proposes revised rules wherein: (1) the violation of rules which at best serve only administrative convenience or do not go to the merits of the cause will rarely form the basis for a final dismissal; (2) actions will be tried in convenient forums and will usually be transferred rather than dismissed if they are brought initially in an inconvenient forum; and (3) plaintiffs who bring actions in courts where personal jurisdiction is questionable will be given an opportunity to have their cases transferred to a convenient forum in which jurisdiction is clearly present. However, since "fair play and substantial justice," the "balance of convenience," or "service calculated to give defendant notice of the action and a reasonable opportunity to defend" are the touchstones laid down by the Supreme Court, and since the essential purpose of venue is to have cases tried

in fair and convenient forums, it has not seemed desirable, and is perhaps not possible, to lay out in advance and with precision all the factual patterns which might arise. Nonetheless, flexible rules, reasonably administered, will tend to insure fairness and as much certainty as can be expected within the developing pattern of law in this area. To the extent that uncertainty becomes a problem, if it ever does, it will be purely a lawyer's problem, and not a problem of injustice to the litigant.

There is some urgency in the suggestions made in this paper. The judicial system is an elaborate institution, very expensive to maintain. The cost-conscious public is not likely to continue to bear the rising expense if the system is seen to breed delay and injustice, especially if attractive alternatives are offered. Such alternatives have already appeared on the horizon; they run the gamut from arbitration to administrative agencies to far-ranging plans for taking certain classes of litigation—such as automobile accident cases—out of the judicial system. Perhaps some of these alternatives are clearly superior to the common law method of settling disputes; if so, they may be adopted without regard to any possible improvements in judicial procedure and administration. But if not, and if the judicial system is to emerge unscathed from the competition with these alternatives, it must be made as modern, as fair in its operation and as efficient as it is capable of being made. Thus, the proposals made here—which may seem at first blush overly venturesome to lawyers who have known only the present rules—are essentially conservative in their objectives.